TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 477 → 116

AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER,

vs.

F. S. ROYSTER GUANO COMPANY

ON WRIT OF CERTIORARI TO THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA

PETITION FOR CERTIORARI FILED MAY 15, 1936.

CERTIORARI GRANTED JUNE 8, 1936.

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OCTOBER TERM, 1924

No. 1230

AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER,

vs.

F. S. ROYSTER GUANO COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA

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[fol. 1] IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation,

vs.

F. S. ROYSTER GUANO COMPANY, a Corporation

PETITION FOR WRIT OF ERROR—Filed July 27, 1923

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the American Railway Express Company, would respectfully show unto Your Honors that it is aggrieved by a certain judgment entered in the Circuit Court of the City of Norfolk on the 13th day of April, 1923, in an action at law in which F. S. Royster Guano Company, a corporation (herein called plaintiff), was the plaintiff, and your petitioner (herein called defendant) was defendant, whereby it was adjudged that the said plaintiff recover of and from the said defendant the sum of Four Hundred and Sixty-one Dollars and Forty ($461.40) Cents with legal interest on Four Hundred and Fifty ($450.00) Dollars, part thereof, from the 15th day of May, 1920, until paid and costs. A duly certified copy of the transcript of the record in said cause is exhibited herewith.

The Ground of the Action and Denial Thereof

This action in debt is based on a default judgment obtained by plaintiff against the Southern Express Company on May 15, 1920, for $450.00 with interest and cost.. The plaintiff justifies its claim against the defendant on an alleged merger or consolidation between the American Railway Express Company and the Southern Express [fol. 2] Company and relies on the decision of this Honorable Court in the case of "American Railway Express Company vs. Downing," 132 Va., p. 139. The facts of the cases wholly differ. The cited case was an action brought against the American Railway Express Company based on a claim against the Adams Express Company wherein evidence was introduced indicating a merger or consolidation between the two companies and other facts that satisfied the Court that a legal liability had been created. The instant case differs from the Downing case in that the plaintiff introduced no evidence of such merger or consolidation. Nor did it otherwise show wherein the defendant could be legally held for the obligations of the Southern Express Company. Conversely the defendant on its part, introduced evidence unquestionably showing that there had been no merger or consolidation of the two companies; that there are no contractual relations whatsoever between them whereby the one corporation has any claim against or control over the other; that the Southern Express Company

retains its franchises and corporate existence; that it owns available assets of approximately $1,000,000; that it is now and has been in lawful existence ever since it was forced by order of the Director General of Railroads to cease operations as an express company in the State of Virginia (July 1, 1918), that it is now and always has been subject to the process of the courts of the City of New York, where it continues to maintain its offices and conduct its lawful business.

Brief Statement of Facts

A brief statement of the facts will be helpful in emphasizing the difference between the records of the two cases.

Prior to the time when the United States Government assumed control of the railroads on the 13th day of April, 1918, and until the 1st day of July, 1918, the Southern Express Company operated an express business under contracts with certain railroads through many of the Southern States, including Virginia. There were other express companies operating in the United States under similar conditions. At this juncture the Director General, who had temporary power to enforce his wishes, made known his intention to deal with but one Express Company throughout the United States (M. R., p. 16). This single company, which is the defendant at bar, was thereupon organized under the direction and supervision of the Director General (M. R., p. 17). The Southern Express Company was forced to cease operations and sell a portion of its assets as proposed to it, under a threat by the Director General to so lower its rates as to render opera-[fol. 3] tion unprofitable if it refused (M. R., p. 17). Its tangible property, scattered all over the Southern part of the United States gave it grave concern. The only way it could obtain anywhere near actual value therefor, under the circumstances, was to sell it to the American Railway Express Company at book value, less depreciation. It was also to its advantage to accept shares of stock of the latter company at par for it. The Government's head officials so ordained. The entire transaction was involuntary, as a practical matter and was forced by the direct order of the Director General (M. R., p. 17). These are matters of history as well as of evidence. An allegation of irregularity, or of a jeopardy of the petitioner is an aspersion against the good faith of the Government most tardily to be entertained.

Manifestly there was no voluntary transfer, no merger and no consolidation in fact or in law, expressly or impliedly. The Southern Express Company under the Director General's program, retained its franchises (M. R., p. 18) and still exists and carries on business today. It is well to repeat that at the time of the judgment in question, the Southern Express Company owned real estate and treasury assets of the value of approximately $1,000,000. It still owns them. There has never been a liquidation, and no distribution whatsoever has been made to its stockholders. (M. R., p. 19.) This is what the record in the instant case discloses and obviously upon which this case must be tried. The Downing case, tried under a different set of facts is not controlling.

Moreover, the authorized capital stock of the American Railway Express Company is $40,000,000; the stock issued and outstanding is $34,642,000. The Southern Express Company owns $1,750,000 of the capitalization equivalent to about 5% of the whole. (M. R., p. 20.) The latter company has no control whatsoever over the former and the former, under the Director General's plan, has no contract with the latter and never intended that it should become liable or that it should reimburse the Southern Express Company for judgments recovered against it on claims and liabilities arising out of its operations, past or future (M. R., p. 21.) It paid as a consideration the full market value for what it bought and there ended its obligations; otherwise there is obviously a taking of private property without just compensation and in violation of the Constitution of the United States.

The Southern Express Company has been, ever since it ceased to operate an express business on the 1st day of July, 1918, and still is, in existence with offices at 51 Broadway, New York City (M. R., p. 21) with ample assets to meet all the known outstanding claims [fol. 4] against it, and is subject to any and all suits which may be or might have been brought against it in any proper forum.

Judgment Against Southern Express Company is Void

(a) On the 15th day of September, 1919, which is fourteen and one-half months after the Southern Express Company had withdrawn from the State of Virginia, and was no longer a foreign corporation doing business in this State, the plaintiff filed its action in assumpsit against it in the Circuit Court of the City of Norfolk (M. R., p. 29) and had process served on the Chairman of the State Corporation Commission, as aforesaid. Judgment was rendered by default on this process in favor of the plaintiff on May 15, 1920.

(b) After this default judgment had lain dormant for more than two years, without execution issuing thereon, as required by Sec. 6477 of the Code, or revival thereof by scire facias, the plaintiff on the first Monday in July, 1922, filed its declaration in debt against your petitioner, the American Railway Express Company, alleging liability against it because of the aforesaid judgment had against the Southern Express Company and for that only, as there were no contractual relations between plaintiff and defendant, alleged or proved. It has been made to appear that plaintiff failed to prove, as a fact, in this record any grounds by which this judgment could be construed as a liability against the American Railway Express Company.

The Pleadings

Defendant, therefore, filed its special plea invoking the statutory limitation against the judgment (M. R., p. 3), but the Court rejected it, to which due exception was taken and preserved (M. R., p. 4), (Cert. of Excpt. No. 1, M. R., p. 7). Upon the trial of the issue joined the Court, without a jury, entered judgment against your peti-

tioner in the sum of $461.00 and costs, with interest on $450.00 part thereof, from the 15th day of May, 1920, until paid, and all costs by it expended (M. R., pp. 4 & 5).

Motion for Rehearing Refused and Exception Noted

The defendant, your petitioner, moved the Court for a rehearing [fol. 5] on the grounds (a) "That the judgment was contrary to the law and the evidence;" and was (b) "In violation of the Federal Constitution." The Court overruled this motion, to which action exception was duly taken and preserved (Cert. of Excep. No. 5, M. R., p. 38). It will be helpful to repeat at this juncture that the plaintiff based its claim against the defendant, your petitioner, solely on the judgment it had recovered against the Southern Express Company because of an alleged consolidation of the American Railway Express Company and the Southern Express Company, heretofore explained (M. R., p. 1). Plaintiff omitted, however, as it was in duty bound to prove such or any consolidation in this record while the evidence introduced by the defendant showed beyond question that there was no consolidation or merger whatever but that it had been organized by direction of the Federal Government and required to purchase a portion of the assets of the Southern Express Company. Your petitioner, the defendant below, with these objections as a basis of its motion unsuccessfully moved the Circuit Court to exclude the record on which plaintiff had obtained the judgment against the Southern Express Company and, also, because to hold your petitioner, the American Railway Express Company, liable for and require it to pay the debts of the Southern Express Company, under this state of the record, would be in violation of the Fourteenth Amendment of the Federal Constitution. Moreover, if it were responsible for the Southern Express Company's debts, it had been deprived of due process of law because the Southern Express Company had never had its day in court, for lack of legal process.

Summary of Petitioner's Contentions

(1) The American Railway Express Company by this record, was not made liable for the debts or obligations of the Southern Express Company because of the former's purchase of a portion of the latter's assets.

(2) The American Railway Express Company, under the plan of the Director General of Railroads, forced upon the two interstate transportation corporations, was not made liable for the debts and liabilities of the Southern Express Company.

(3) Such a course would have been contrary to the Constitution of the United States as a taking of private property without just compensation.

[fol. 6] (4) The judgment in question had against the Southern Express Company is void and of no effect because process was not

served on defendant, or lawful substituted process availed of and is contrary to the Federal Constitution because lacking in due process of law.

(5) The judgment, had it been regularly and legally obtained, was no longer available because no execution had issued upon it within a year and in fact within more than two years.

Assignment of Errors

The Circuit Court erred in:

(1) Holding that the American Railway Express Company, upon the facts of this record, became liable for the debts and obligations of the Southern Express Company because of the purchase of and payment in good faith for certain of the latter's assets.

(2) Holding that under the plan of the Director General of Railroads your petitioner became liable or was expected or required under any circumstances to become liable for the debts and obligations of the Southern Express Company, because such conduct would be in violation of the Constitution of the United States.

(3) Rejecting the special plea setting up the statutory limitation against the judgment had by plaintiff below against the Southern Express Company and preserved in Exception No. 1 (M. R., pp. 4 and 7).

(4) Admitting in evidence at the trial the record in the case of "F. S. Royster Guano Company v. Southern Express Company," over your petitioner's objection "of lack of proper process" as shown by the record (M. R., p. 9), and as depriving it of due process of law under the Federal Constitution.

(5) Refusing to set aside the judgment because contrary to the law and the evidence and enter judgment for the defendant.

(6) Overruling the defendant's motion to reject the evidence in- [fol. 7] troduced by the plaintiff and enter judgment for the defendant, on the grounds that the plaintiff had omitted to prove a merger or consolidation of the American Railway Express Company with the Southern Express Company wherefore the evidence introduced was wholly irrelevant and immaterial. Moreover a judgment against the American Railway Express Company, under the record would be in violation of the Fourteenth Amendment to the Federal Constitution. (Cer. of Ex. No. 4, M. R., p. 37.)

Argument

The Faulty Process (Error No. 4)

(1) Process in the case of F. S. Royster Guano Company vs. Southern Express Company was obtained on the Chairman of the State Corporation Commission two years or more after the South-

ern Express Company had withdrawn from the State of Virginia and was no longer "A foreign corporation doing business in the State of Virginia," as provided by statute upon which statutory substituted process could be had. C. V. 1904, Sec. 3225. It is manifest that the Southern Express Company was deprived of due process of law in the judgment entered. For convenience the officer's return is reproduced as follows:

"John B. Hockaday, the lawfully appointed Agent upon whom may be served all lawful process against the within mentioned Southern Express Company, Incorporated, a foreign corporation, being no longer a resident of the State of Virginia, and being absent from the State and no person residing in this State having been appointed in his place the within summons was executed on this 16th day of September, 1919, by delivering a true copy of the same to William F. Rhea, the Chairman of the State Corporation Commission, in person, in the City of Richmond, Virginia, in which city the said William F. Rhea resides, and by immediately transmitting a copy hereof by mail to said Southern Express Company, Incorporated.

"(Signed) J. Herbert Mercer, Sheriff of the City of Richmond, by B. A. Braner, Deputy Sheriff."

[fol. 8] Rejection of Special Plea (Error No. 3)

(2) In rejecting defendant's special plea of limitation to the judgment which is the basis of the plaintiff's action (Cert. of Ex. No. 1, M. R., p. 7). Sec. 6477 Code of 1919 reads in part:

"On a judgment, execution may be issued within a year, and a scire facias or an action may be brought within ten years after the date of the judgment. * * *"

Execution was not issued "within a year" and the judgment has never been revived by "scire facias" or "action" as intended by the statute. Manifestly the results to be obtained by "scire facias" or by "action" were intended to be the same, viz: to revive and not to enforce the judgment. In White vs. Palmer, 110 Va. 490, this Court held that the proceedings by scire facias is not a new suit but a continuation of the old suit; that it is essential that the writ shall state all of the facts necessary to authorize the relief sought and that it should follow the judgment to be revived as to the amount, date and parties.

In the same case this Court held that the extent of the jurisdiction of the Court upon a proper writ of scire facias to revive a judgment, is to render a judgment to the effect that the plaintiff in the writ may have execution issue on the judgment set forth in the writ. It further held that if the judgment goes further and awards the payment of money, the latter is void for want of jurisdiction and may be assailed collaterally.

It is manifestly that the Circuit Court's error lies in construing the word "action" in the statute to apply to any action which might be brought on the judgment, either to enforce payment or to revive it for execution, either against the same or third persons not parties to the original action. In view of the intent disclosed from a reading of the statute and the construction placed thereon by this Court in White vs. Palmer, supra, it is respectfully suggested that the trial court's construction and ruling was erroneous.

Improper Evidence (Error No. 4)

(3) In admitting in evidence the record in the case of F. S. Royster Guano Company vs. Southern Express Company, over objection of the defendant on the grounds that the judgment as shown [fol. 9] by the record was not valid for lack of proper process on the Southern Express Company. (Cer. of Ex. No. 3, M. R., p. 36.)

The process obtained against the Southern Express Company was served on the Chairman of the State Corporation Commission of Virginia on the 15th day of September, 1919. This was prior to the adoption of the 1919 Code, and fourteen and one-half months after the Southern Express Company withdrew from the State of Virginia and ceased to operate over any of the railroads, steamship or steamboat lines or to do any other business in the State, as provided by statute.

Subsections 2 and 3 of Sec. 1294g of the Code of 1904 as amended which provide for process on such corporations, etc., are as follows:

"To Appoint Person upon Whom Process May be Served.

"(2) Every such corporation, company, association, person or partnership shall, by a written power of attorney, appoint some person residing in this State its agent, upon whom may be served all lawful process against such corporation, company, association, person or partnership, and who shall be authorized to enter an appearance in its or his behalf. A copy of such power of authority, duly certified and authenticated, shall be filed with the State Corporation Commission, and copies thereof, duly certified by the clerk of the said commission, shall be received as evidence in all courts of this State.

"When Another Agent to be Appointed; Upon Whom Process to be served.

"(3) If any such agent shall be removed, resign, die, become insane, or otherwise incapable of acting, it shall be the duty of such corporation, company, association, person, or partnership, to appoint another agent in his place, as prescribed by the preceding section. And until such appointment is made, or during the absence of such agent of any such corporation, company, association, person or partnership, from the State, or if no such agent be appointed as prescribed by the preceding action, service of process may be upon the chairman of the State Corporation Commission, with like effect as

[fol. 10] upon the agent appointed by the company. The officer serving such process upon the chairman of the State Corporation Commission shall immediately transmit a copy thereof, by mail, to such corporation, company, association, person, or partnership, and state such fact in his return."

These statutes manifestly apply to those corporations actually operating an express business in the State and not to those which may have at some time operated and have long since withdrawn. It is respectfully contended that there is no law past or present and none has been cited, which forbids a foreign corporation from withdrawing from the State of Virginia at will, and none which requires the maintaining of officers or agents after such withdrawal. Without such a law, statutory or otherwise, it is obvious that process obtained in a manner provided for non-residents that are now operating in the State of Virginia would not be valid process on such residents no longer doing business in the State. It is not necessary for our purpose to contend that the Legislature is incapable of making such provision. Manifestly, if the time for such process could be extended fourteen and one-half months by implication under the existing statutes just cited, it could be extended indefinitely. No comment on this is necessary as to federal interstate policy or comity.

Refusal to Reject All Evidence (Error No. 6)

(4) In overruling the defendant's motion to reject the evidence introduced by the plaintiff and enter judgment for the defendant, on the grounds that the plaintiff had failed to prove a merger or consolidation of the Southern Express Company, and that to hold the company liable for the debts of the former would be in violation of the Fourteenth Amendment to the Federal Constitution. (Cert. of Ex. No. 4, M. R., p. 37.)

There was no privity between the Royster Guano Company, the plaintiff in the instant case and the American Railway Express Company, the defendant therein. Plaintiff's relations were solely with the Southern Express Company. If, therefore, the American Railway Express Company became obligated to the plaintiff it must arise out of its conduct implying a contract in law. Obviously such conduct must be established by satisfying evidence. Plaintiff alleged a merger or consolidation between the two corporations as the conduct creating a privity between it and the American Railway [fol. 11] Express Company. If it failed to prove such merger its case fell. The record of judgment was immaterial and irrelevant and therefore highly prejudicial. We have shown that plaintiff failed to introduce the necessary proof of a merger, which being a condition precedent to the introduction of other evidence, none other was admissible and that introduced possessed no probative value. Conversely the defendant introduced conclusive evidence that there not only had never been a merger or consolidation of the two interstate transportation companies in question; that there are no relations con-

tractual or otherwise between them; that but a small portion of the assets were bought; that no distribution to the shareholders had been made; that the corporation continued in business with plenty of assets to meet all its obligations and that the purchase of the assets was an involuntary one at the order of the Government. The Southern Express Company owns a comparatively small percentage of the capital stock of the American Railway Express Company. The Southern Express Company is a separate and independent entity. It maintains its franchises and corporate existence and owns assets of approximately $1,000,000. It operates at 51 Broadway, New York City, and is responsible for its contracts and torts (M. R., p. 22). It is obvious that these facts do not constitute a merger or consolidation or in any way impose any legal or moral obligation on the defendant, your petitioner, to pay the debts of the Southern Express Company.

American Railway Express Company vs. Downing Distinguished

The plaintiff relies upon American Railway Express Company vs. Downing (132 Va. 139). The record in the principal case is wholly different. The cited case is not authority, as will appear from a brief examination. The liability of the American Railway Express Company for the obligation of the Adams Express Company rests on a proven consolidation between the two companies (p. 145) which is wholly absent in the instant case.

For whatever the proof consolidation or merger in the Downing case, there is no such proof in the case at bar and that is the factor upon which this point will turn. The plaintiff introduced interrogatories (M. R., p. 10, et seq.) to show that the defendant company had issued to the Southern Express Co. certain of its capital stock in payment for certain tangible assets that it had been required by the Government to buy in order to save them from waste or [fol. 12] sacrifice. Outside of this, there is an entire absence of proof of any contractural relations, express or implied and no legal, equitable or moral grounds upon which to place liability on the defendant for the obligation in question. The stock is still a treasury asset, along with about $1,000,000 additional.

The supporting cases cited by the Court in the opinion evidence this contention. They deal with a new company under a consolidation or merger wherein the old are extinguished and their assets absorbed. None deny the right of a corporation to purchase and pay for a portion of the assets of another with its shares of stock Such law would prove a serious handicap in the ordinary course of business. After all, liability would be but a matter of degree—the amount of the purchase. Clearly in the light of those authorities and the conclusions reached by the Court, a mere transfer of a part of the assets by one corporation to another, the former retaining its franchises, corporate existence, with ample assets to pay all its known outstanding indebtedness, and still doing business in a sister State subject to the laws of that State, there is no merger or con-

solidation with the purchasing corporation and no liability on the latter for the debts of the former.

This contention is satisfactorily supported by the opinion in the Downing case. On page 146, Judge Sims quotes from 6 Am. & Eng. Enc. Law (2nd Ed.), p. 818, Sec. 4, as follows:

"When two or more corporations are consolidated into a new corporation with a new name, and the constituent corporations *go out of existence, if no arrangements are made respecting their property and liabilities*, the consolidated corporation will be answerable for their liabilities, at least to the extent of the property acquired from the constituent corporations whose liability is sought to be enforced against the consolidated corporation." (Italics inserted.)

The Defendant's Evidence in Support

William M. Barrett, for the defendant, testified as follows (M. R., p. 21):

26 Q. Does the Southern Express Company still retain its corporate existence?

A. Yes.

27 Q. Does it maintain offices anywhere?

A. Yes.

28 Q. Where?

[fol. 13] A. New York only.

30 Q. Does it have officers at these offices who are authorized to accept service of suits against it?

A. Yes.

The uncontradicted evidence on behalf of the defendant shows that the Southern Express Co. did not transfer anything like all of its property to the American Railway Express Co. and that claims of its creditors have not in any sense been defeated thereby. Mr. Barrett testified (M. R., p. 18):

10 Q. Did the Southern Express Company retain any property at the time it transferred its tangible property to the American Railway Express Company?

A. Yes.

11 Q. Approximately what amount?

A. We retained such real estate as was not used in the express operation business, together with treasury assets, the value of which was approximately $1,000,000.

There has been no distribution of assets among the stockholders of the Southern Express Company, but they are held to meet its obligations.

Mr. Barrett testified (M. R., pp. 18 and 19):

12 Q. Has the Southern Express Company liquidated itself by distributing any of its property or the stock of the American Railway Express Company to its stockholders?

A. No.

13 Q. There has been no distribution to the stockholders whatsoever?

A. No.

14 Q. Then the stock of the American Railway Express Company which was received in exchange for the tangible property of the Southern Express Company used in the domestic express business is still in the possession of the Southern Express Company?

A. Yes.

And, furthermore, the creditors of the Southern Express Company have never at any time been required to look alone to the stock received by the Southern Express Company from the American Railway Express Company in payment of assets transferred by it. More- [fol. 14] over, the record fails to show that there were any outstanding obligations against the Southern Express Company other than that of the plaintiff. That the Southern Express Company retained real and treasury assets of a value of approximately $1,000,000, which was but a fraction of the assets of the corporation Mr. Barrett testified as follows (M. R., p. 22):

31 Q. Does it have ample assets to meet all the known outstanding claims against it?

A. Yes.

On page 21 of the record, Mr. Barrett testified (M. R., p. 21):

24 Q. Has the Southern Express Company any contract with the American Railway Express Company by which the Southern Express Company agrees to reimburse the American Railway Express Company for judgments recovered against the American Railway Express Company on claims and liabilities of the Southern Express Company?

A. No, and there never was.

25 Q. If a judgment is recovered against the American Railway Express Co. in this suit, what proportion of it will affect the dividends of the Southern Express Co.?

A. Approximately about 5%.

This is the evidence introduced by the defendant, your petitioner, not in rebuttal, for there was no evidence to rebut, but in order that the record might evidence the facts. Manifestly, under such a record there is no merger or consolidation and the defendant company is not liable under an implied obligation to pay the debts of the Southern Express Company. Such a judgment, it is respectfully suggested, would be the taking of its property to discharge the obligations of another and therefore in violation of the Fourteenth Amendment of the Federal Constitution. In the absence of proof of a merger or consolidation of the two companies, there are no contractual or other grounds upon which the one could be held for the obligations of the other. If the record does not establish this potent fact

the case falls without reference to the other errors set forth for which contention is made.

Wherefore, your petitioner prays that a writ of error and supersedeas to the judgment complained of may be awarded it and that for the errors assigned and said judgment be set aside and an- [fol. 15] nulled; and that judgment be entered for your petitioner, or, if this prayer be not granted, that the judgment herein complained of be set aside and annulled and your petitioner be granted a new trial.

American Railway Express Company, by Alfred Anderson, Thomas W. Shelton, Counsel.

I, Thomas W. Shelton, of the City of Norfolk, Virginia, an attorney at law, practicing in the Supreme Court of Appeals, do certify that in my opinion the decision of the Circuit Court of the City of Norfolk, in the common law action of F. S. Royster Guano Company vs. American Railway Express Company should be reviewed by the Supreme Court of Appeals of Virginia.

Thomas W. Shelton.

Given under my hand this 24th day of July, 1923. F. W. Sims.

Write of error and supersedeas awarded. Bond $700.00.

F. W. Sims.

To the Clerk at Richmond.
Received July 28, 1923.

VIRGINIA:

IN CIRCUIT COURT OF CITY OF NORFOLK

F. S. ROYSTER GUANO COMPANY, a Corporation, Plaintiff,

v.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, Defendant

[fol. 16] [Caption omitted]

DECLARATION—Filed July, 1922

Be it remembered, that heretofore, to-wit, in the Clerk's Office of the Circuit Court of the City of Norfolk, at Rules held for said Court on the first Monday in July, 1922, came the plaintiff, F. S. Royster Guano Company, and filed its declaration in debt against the defendant, Amreican Railway Express Company, in the following words:

Debt for $450.00, with legal interest from May 15th, 1920. Damages $100.00.

F. S. Royster Guano Company, a corporation under the laws of the State of Virginia, complains of American Railway Express Com-

pany, a corporation under the laws of the State of Delaware, for this, that heretofore, to-wit, on the 15th day of May, 1920, the plaintiff by the consideration and judgment of the Circuit Court for the City of Norfolk, Virginia, recovered against the Southern Express Company, Incorporated, a foreign corporation, the sum of $450.00 damages, with lawful interest thereon from said 15th day of May, 1920, and $11.40 costs of suit as by the record thereof in the same court remaining appears; which said judgment still remains in full force and effect, and the several sums aforesaid are still due and unpaid.

And before said judgment and on or about July 1st, 1918, the defendant took over from said Southern Express Company, Incorporated, all of the property theretofore belonging to it then owned and used by said Southern Express Company, Incorporated, in its express business throughout the United States, including all of such property in Virginia, issuing therefor to said Southern Express Company, Incorporated, or to its stockholders, the stock of said American Railway Express Company, the defendant in this action, by means whereof the assets of said Southern Express Company, Incorporated, have been distributed among its stockholders to the exclusion and prejudice of its creditors.

Whereof an action hath accrued to said plaintiff to have and recover of said defendant the sum of $450.00, with interest and $11.40 [fol. 17] costs, as aforesaid, yet said defendant, though requested, hath never paid said sum, but wholly refuses so to do to the damage of said plaintiff of one hundred dollars.

Cadwallader J. Collins, p. q.

In Circuit Court of City of Norfolk

Conditional Judgment

Whereupon, the defendant having been summoned, and failing to appear, and plead, answer or demur, a conditional judgment was entered against it.

And at another day, to-wit: In the Clerk's Office of the said Court, at Rules held for said Court on the third Monday in July, 1922, the defendant still failing to appear, the judgment entered at the last rules was confirmed, and an office judgment was awarded the plaintiff.

In Circuit Court of City of Norfolk

Order Setting Aside Judgment and Granting Leave to File Special Plea—Oct. 9, 1922

This day came as well the plaintiff by its attorney, as the defendant by Shelton & Anderson, its attorneys, and thereupon, on motion of the defendant, which pleaded nil debit, to which the plaintiff replied generally, it is ordered that the judgment entered at the rules be set

aside, and issue is joined. Thereupon, on motion of the defendant, leave is given it to file a special plea herein, and the same is accordingly filed; and the further hearing is continued.

IN CIRCUIT COURT OF CITY OF NORFOLK

SPECIAL PLEA—Filed Oct. 9, 1922

The said defendant by its attorneys comes and says that the supposed cause of action in the declaration in this action mentioned is founded upon a judgment, dated the 15th day of May, 1920, upon which execution was not issued within the period of limitation allowed by the laws of the State of Virginia and is no longer in force and effect for enforcement against said defendant, were it liable in the manner and form as said plaintiff hath complained against it. And this the said defendant is ready to verify.

Thomas W. Shelton and Alfred Anderson, p. d.

The said defendant, by its attorneys, comes and says that he does [fol. 18] not owe the sum of Four Hundred and Fifty ($450.00) Dollars with interest and Eleven Dollars and Forty ($11.40) Cents cost in the declaration in this action demanded in manner and form as the plaintiff hath complained against him. And of this the said defendant puts himself upon the country.

Thomas W. Shelton and Alfred Anderson, p. d.

IN CIRCUIT COURT OF CITY OF NORFOLK

ORDER SUSTAINING MOTION TO STRIKE SPECIAL PLEA AND CONTINUING CAUSE

This day came again the parties by their attorneys and thereupon the plaintiff moved the Court to strike out the special plea heretofore filed herein by the defendant, which motion being argued, is sustained, to which ruling the defendant excepted; and the further hearing is continued.

IN CIRCUIT COURT OF CITY OF NORFOLK

JUDGMENT—April 13, 1923

This day came again the parties by their attorneys and thereupon, neither party demanding a jury, the Court proceeded to hear the evidence and try the case. Whereupon it is considered by the Court that the plaintiff recover against the defendant the sum of Four Hundred and Sixty-one Dollars and Forty Cents ($461.40), with legal

interest on $450 part thereof, from the 15th day of May, 1920, till paid, and its costs by it about its suit in this behalf expended. Thereupon the defendant moved the Court to set aside the said judgment, and grant a rehearing, which motion being argued, is overruled, to which ruling the defendant excepted.

IN CIRCUIT COURT OF CITY OF NORFOLK

ORDER SUSPENDING JUDGMENT

Be it remembered that on the trial of this case the defendant excepted to sundry rulings of the Court on the trial, and to the action of the Court in refusing to set aside the judgment entered by the Court, and to the judgment rendered by the Court, and leave is given the defendant to file its certificate of exceptions herein within the time prescribed by law.

MEMO.—At the instance of the defendant, which desires to present a petition to the Supreme Court of Appeals of Virginia, it is ordered [fol. 19] that execution upon said judgment be suspended for a period of sixty days from the end of this term upon the defendant, or someone for it, entering into and acknowledging a bond before the Clerk of this Court in the penalty of $500, conditioned according to law, with surety deemed sufficient by said Clerk.

IN CIRCUIT COURT OF CITY OF NORFOLK

MINUTE ENTRY OF ORDER TO FILE BILL OF EXCEPTIONS—May 23, 1923

This day came again the parties by their attorneys, and thereupon the defendant tendered to the Court its Bills of Exceptions Numbers One and Two, which were received by the Court, signed and sealed, and ordered to be made a part of the record, the same having been tendered within the time prescribed by law.

IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

BILL OF EXCEPTION NO. 1 AND ORDER SETTLING SAME

The said defendant, by its attorneys, comes and says that the supposed cause of action in the declaration in this action mentioned is founded upon a judgment, dated the 15th day of May, 1920, upon which execution was not issued within the period of limitation al-

lowed by the laws of the State of Virginia and is no longer in force and effect for enforcement against said defendant, were it liable in the manner and form as said plaintiff hath complained against it. And this the said defendant is ready to verify.

The foregoing plea was filed by the defendant, which plea the plaintiff moved the Court to reject, which motion was sustained and to which ruling of the Court the defendant excepted

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

[fol. 20] IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

BILL OF EXCEPTION NO. 2

The following evidence on behalf of the plaintiff and of the defendant, including interrogatories on behalf of the plaintiff and depositions on behalf of the defendant, respectively, as hereinafter denoted, is all of the evidence that was introduced on the trial of this cause.

ARGUMENT OF COUNSEL

Mr. Collins: If your Honor please, we introduce in evidence the entire record of the case of F. S. Royster Guano Company vs. Southern Express Company, including the judgment, final judgment, of course, rendered in the sum of $450.00 on the 15th day of May, 1920, including costs. We introduce this record in the case, of course, and ask that the clerk make out a memorandum of it, including all the papers, and the judgement rendered on that date.

Mr. Anderson: I desire to interpose an objection to the record and particularly to the judgement on the grounds that the judgement is not a valid judgement, process not having been properly obtained, and I desire to make specific reference to the officer's return, which shows that J. B. Hockaday was the only constituted agent of the Southern Express Company upon whom process was to be served, and that there was never an appointment under the statute of the Secretary of the Commonwealth as such agent, and furthermore that at the time of the service the Southern Express Company was not a foreign corporation doing business in the State of Virginia, and even though there had been such an appointment process on the Secretary of the Commonwealth would not have been valid after the withdrawal of the corporation from the State.

The Court: Do you desire to argue that?

Mr. Anderson: I think I can save time by taking up the argument afterward.

The Court: I overrule your objection temporarily, and you can note an exception.

(Exception noted.)

Mr. Collins: If your Honor please, I will now introduce the inter- [fol. 21] rogatories taken for the plaintiff in this case, and will read them to your Honor.

Mr. Anderson: I will read the interrogatories and let you read the answers, if you want to.

NOTE.—Interrogatories and answers on behalf of plaintiff were read as follows:

"IN THE CIRCUIT FOR THE CITY OF NORFOLK, VIRGINIA

F. S. ROYSTER GUANO COMPANY, a Corporation, Plaintiff,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, Defendant

PLAINTIFF'S INTERROGATORIES

Interrogatories filed with the clerk of the above-named court by the plaintiff, F. S. Royster Guano Company, and to be answered by the defendant, American Railway Express Company, a non-resident corporation.

First. In the month of June, 1918, did you enter into an agreement with the Southern Express Company, and others, by the terms of which you were to carry on, throughout the United States, the express transportation business theretofore transacted by said Southern Express Company and others?

Answer to interrogatory first. No.

Second. Did you at any time enter into any such agreement?

Answer to interrogatory second. No. The American Railway Express Company did not at any time enter into any agreement with the Southern Express Company and others by the terms of which it was to carry on the express transportation business theretofore transacted by the Southern Express Company.

Third. If you have ever entered into any such agreement please file a copy thereof with your answer.

Answer to interrogatory third. See answers to first and Second Interrogatories.

Fourth. On or about the 1st day of July, 1918, did you take over the business of the Southern Express Company and all of its tangible property theretofore owned by it and used in its business paying therefore in whole or in part in the capital stock of the American Railway Express Company?

[fol. 22] Answer to interrogatory fourth. No. This defendant did not take over the business of the Southern Express Company on the first of July, 1918, or at any other time; the American Railway Express Company purchased on June 30th, 1918, the tangible property used in the express business theretofore owned by the Southern Express Company, and paid for same with shares of its capital stock.

Fifth. What was the valuation placed upon said property?

Answer to interrogatory fifth. The valuation placed on property purchased from the Southern Express Company cannot be given as the Southern Express Company was owned by the Adams Express Company, and the value of their tangible property was included in the value of the property purchased from the Adams-Southern Companies.

Sixth. Was the value placed upon said property paid for with capital stock of the American Railway Express Company in whole or in part?

Answer to interrogatory sixth. All of the property purchased from the Adams-Southern Companies was paid for with capital stock of the American Railway Express Company.

Seventh. What amount of stock of the American Railway Express Company was given for said property to the Southern Express Company?

Answer to interrogatory seventh. 10,000 shares of stock of the American Railway Express Company were issued in the name of the Southern Express Company, at the request and direction of the Adams and Southern Express Companies.

Eighth. Did you take over from the Southern Express Company all of its tangible property in Virginia, paying therefor in the capital stock of the American Railway Express Company?

Answer to interrogatory eighth. The American Railway Express Company purchased all of the tangible property owned by the Southern Express Company in Virginia and used in the express business, and all such property was paid for in capital stock of the American Railway Express Company.

Ninth. What valuation was placed upon the property of the Southern Express Company in Virginia taken over by you and paid for in the capital stock of the American Railway Express Company?

Answer to interrogatory ninth. I do not know.

Tenth. What was the par value of the shares of stock of the Ameri-[fol. 23] can Railway Express Company in the month of June and July, 1918, and how many of these shares were delivered to the Southern Express Company for the property owned and used by it in its express business in Virginia?

Answer to interrogatory tenth. $100.00 each was, and is, the par value of shares of stock of the American Railway Express Company. I do not know.

And further this deponent saith not.

(Signed) W. A. Benson.

NOTE.—The foregoing interrogatories are filed in accordance with Section 6236 of the Code of Virginia.

Mr. Collins: Now, if your Honor pleases, we have introduced the interrogatories and record in this case, and rest our case on the interrogatories and the record.

Mr. Anderson: I will read the deposition, if your Honor pleases, of William M. Barrett, taken on behalf of the defendant.

"VIRGINIA:

In the Circuit Court of the City of Norfolk

In the Matter of

ROYSTER GUANO COMPANY

vs.

AMERICAN RAILWAY EXPRESS COMPANY

The deposition of William M. Barrett, taken before me, Rita Ohlsen, a notary public for the county of New York, in the State of New York, pursuant to notice hereto annexed, at 2 Rector street, New York, on the 27th day of February, 1923, between the hours of 9 a. m. and 5 p. m., having been adjourned from February 26th, 1923, to be read as evidence on behalf of American Railway Express Company in a certain action at law depending in the Circuit Court of the City of Norfolk, Virginia, wherein Royster Guano Company is plaintiff and American Railway Express Company is defendant.

Present: Kenneth E. Stockton, for the defendant.

[fol. 24] The witness, WILLIAM M. BARRETT, being duly sworn, deposes as follows:

1. First question for defendant. Please state your name, age and residence?

Answer. William M. Barrett; 64; 272 West 86th Street, New York City.

2. Second question for same. What official capacity do you hold with reference to the Southern Express Company, Mr. Barrett?

Answer. President.

3. Third question for same. Do you have any official capacity with reference to the Adams Express Company?

Answer. I have.

4. Fourth question for defendant. What is it?

Answer. President.

5. Fifth question for defendant. How long have you been president of the Adams Express Company?

Answer. About 12 years.

6. Sixth question for defendant. Are you familiar with the transaction by which the Southern Express Company transferred its tangible assets used in the domestic express business to the American Railway Express Company?

Answer. I am.

7. Seventh question for defendant. Did you have a personal part in the circumstances surrounding that transaction?

Answer. I did.

8. Eighth question for defendant. Did you negotiate personally with the Director General of Railroads and his representatives concerning the transfer of such tangible property of the Southern Express Company to the American Railway Express Company?

Answer. I did.

9. Ninth question for defendant. Will you state briefly what alternative the Southern Express Company found itself confronted by on December 28, 1917, when the Director General of Railroads took over control of all the railroad companies?

Answer. It was necessary for the Southern Express Company's business to operate over railroad lines, and we could not tell at first whether or not the Southern Express Company was taken over by the Director General, as well as the railroad lines. We went to Wash- [fol. 25] ington to interview him and, after considerable discussion, he finally held that he had not taken over the express companies and declared that he would not do so. He finally indicated that he would be willing to deal with a single company which should operate all over the United States. As President of the Adams Express Company, I told him that I was willing for the Adams Express Company to turn over its operating property to such a company, but I would not agree to turn over the Southern Express Company's property to such a single company as we preferred to operate it ourselves or to have it taken over under Federal control. Mr. Prouty, who was the representative of the Director General, with whom I was dealing, said that he could make the Southern Express Company transfer its property to the single company to be formed and indicated that if it did not, he would see that its rates were lowered which was within the Director General's power. The Director General refused to recognize any of the old contracts between the Southern Express Company and the railroads over which it was operating, and if he had refused to allow it to operate over these railroads, the Southern Express Company would have had to go out of business. In such case, its tangible property would have been scattered all over the southern part of the United States, and it would have been impossible to realize for it anywhere near what it was actually worth. The only way that we could obtain anywhere near the actual value of the physical property of the Southern Express Company under those circumstances was by transferring it to the American Railway Ex-

press Company at its book *v*alue less depreciation, taking stock of the American Railway Express Company at par. This entire transaction was, as a practical matter, forced upon the Southern Express Company by the emergencies of the situation, by the direct order of the Director General of Railroads. The entire organization of the American Railway Express Company was under the supervision of the Director General of Railroads. The Southern Express Company would have much preferred to take money in exchange for its property, but the plan of organization of the American Railway Express Company, approved by the Director General of Railroads, only contemplated the issue of the stock for this property, and, as a matter of fact, the Southern Express Company was compelled by the Director General to contribute about $300,000 in cash toward a fund for working capital for the newly formed American Railway Express Company. The transfer was not voluntary in any sense and was only made in order to secure as nearly as we could [fol. 26] the actual physical value of the property transferred. This transfer only included the real estate and equipment used in the express business and the Southern Express Company did not transfer to the American Railway Express Company any of its franchises.

10. Tenth question for the defendant. Did the Southern Express Company retain any property at the time it transferred its tangible property to the American Railway Express Company?

Answer. Yes.

11. Eleventh question for defendant. Approximately what amount?

Answer. We retained such real estate as was not used in the express operation business, together with treasury assets, the value of which was approximately $1,000,000.

12. Twelfth question for defendant. Has the Southern Express Company liquidated itself by distributing any of its property or stock of the American Railway Express Company to its stockholders?

Answer. No.

13. Thirteenth question for defendant. There has been no distribution to the stockholders whatsoever?

Answer. No.

14. Fourteenth question for the defendant. Then the stock of the American Railway Express Company which was received in exchange for the tangible property of the Southern Express Company used in the domestic express business is still in the possession of the Southern Express Company?

Answer. Yes.

15. Fifteenth question for defendant. Are you a member of the board of directors of the American Railway Express Company?

Answer. I am.

16. Sixteenth question for defendant. Will you state how many directors there are on the board of directors of the American Railway Express Company?

Answer. The full complement is 12.

17. Seventeenth question for defendant. How many directors of

the American Railway Express Company are directors or officers of the Southern Express Company?

Answer. Four.

18. Eighteenth question for defendant. Are you an officer of the American Railway Express Company?

Answer. No.

19. Nineteenth question for defendant. Is any officer or director of the Southern Express Company an officer of the American Railway Express Company?

[fol. 27] Answer. No.

20. Twentieth question for defendant. Do you know what the total amount of issued capital stock of the American Railway Express Company is?

Answer. Capital stock is $40,000,000; the stock issued is $34,642,000.

21. Twenty-first question for defendant. What is the par value of the capital stock of the American Railway Express Company owned by the Southern Express Company?

Answer. $1,750,00-.

22. Twenty-second question for defendant: Is there any voting trust or other arrangement by which the Southern Express Company controls the policy or operations of the American Railway Express Company?

Answer. No.

23. Twenty-third question for defendant. Does the Southern Express Company own any obligations of the American Railway Express Company except the stock above mentioned?

Answer. No.

24. Twenty-fourth question for defendant. Has the Southern Express Company any contract with the American Railway Express Company by which the Southern Express Company agrees to reimburse the American Railway Express Company for judgments recovered against the American Railway Express Company on claims and liabilities of the Southern Express Company?

Answer. No, and there never was.

25. Twenty-fifth question for defendant. If a judgment is recovered against the American Railway Express Company in this suit, what proportion of it will affect the dividends of the Southern Express Company?

Answer. Approximately about 5%.

26. Twenty-sixth question for defendant. Does the Southern Express Company still retain its corporate existence?

Answer. Yes.

27. Twenty-seventh question for defendant. Does it maintain offices anywhere?

Answer. Yes.

28. Twenty-eighth question for defendant. Where?

Answer. New York only.

29. Twenty-ninth question for defendant. Where are those offices located?

Answer. 51 Broadway, New York.

[fol. 28] 30. Thirtieth question for defendant. Does it have officers at these offices who are authorized to accept service of suits against it?

Answer. Yes.

31. Thirty-first question for defendant. Does it have ample assets to meet all the known outstanding claims against it?

Answer. Yes.

And further this deponent saith not.

(Signed) William M. Barrett.

STATE OF NEW YORK,
County of New York, ss:

I, Rita Ohlsen, a Notary Public for the county of New York, in the State of New York, do hereby certify that the foregoing deposition was duly taken, reduced to writing and signed by the witness before me, at the place and time therein mentioned, pursuant to the annexed notice.

In witness whereof I have hereunto set my hand and affixed my official seal at New York aforesaid, this 27th day of February, 1923.

(Signed) Rita Ohlen, Notary Public. Notary Public, Kings Co., No. 117. Certificate filed Kings Co. Register's Office No. 3060. Certificate filed New York County No. 165. Certificate filed N. Y. Register No. 3127. Commission expires March 30th, 1923."

Mr. Anderson: I offer these depositions in evidence, and I also offer in evidence a copy of the articles of the incorporation of the American Railway Express Company.

Mr. Collins: Objected to as being absolutely irrelevant and having nothing to do with this case. It is not a certified copy at all.

Mr. Anderson: I can get and have furnished a certified copy. You are objecting to it on the grounds of irrelevancy?

Mr. Collins: Yes.

NOTE.—Articles of the incorporation are read, as follows:

[fol. 29] "ARTICLES OF INCORPORATION OF THE AMERICAN RAILWAY EXPRESS COMPANY

First. The name of this Corporation shall be the American Railway Express Company.

Second. Its principal office or place of business in the State of Delaware shall be located in the city of Dover, County of Kent, and its resident agent shall be the United States Corporation Company, whose address is 311 South State Street, in said city.

Third. The nature of the business and the objects and purpose proposed to be transacted, promoted and carried on, are as follows:

To engage in and carry on in the State of Delaware, and in and between any and all of the States, Territories and possessions of the United States and the District of Columbia, and in adjacent foreign countries, the business of carrying and transporting and forwarding by railroads, steamboats, ships, canals, stages and other means of transportation, goods, wares, merchandise, money, bills, notes, bullion, packages, parcels and movable valuables of any description, over and upon such lines and routes as it may from time to time establish, and in and between the points, places or stations at which it may from time to time establish and continue agencies; and the said corporation is hereby invested with the powers necessary and proper for said purpose, as well as the powers incident and appropriate to express carriers, and especially with full power to give such security in the nature of a general transportation bond as may be required by the laws of the United States and the regulations passed in relation thereto for the transportation and delivery of dutiable merchandise and other property in bond, from port to port in the United States or through the United States.

To take bonds of indemnity with or without security from its agents and employes to acquire by purchase, devise or otherwise, [fol. 30] and to hold real and personal estate of any value to the amount necessary and proper for the purpose for which it is incorporated, and to sell, mortgage or otherwise dispose of the same;

To borrow, when necessary for the purpose of its business, money, with or without pledge of or mortgage on all or any of its property, real or personal, as security;

To take, hold and dispose of any mortgage on real or personal estate; and to issue bonds, debentures or obligations of the corporation from time to time for any of the objects or purposes of the corporation;

To have one or more offices, to carry on any or all of its operations or business and without restriction or limits as to amount to purchase or otherwise acquire, to hold, own, to mortgage, sell, convey, or otherwise dispose of real and personal property of every class and description in any of the states, territories, districts, colonies, or possessions of the United States and in adjacent foreign countries, subject to the laws of such state, district, territory, colony, possession or country;

To enter into, make, perform, and carry out contracts of every kind for any lawful purpose without limit as to amount with any person, firm, association or corporation; and to act as agent for any person, firm, association or corporation for any lawful purpose; and to do a general collection business.

The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation.

In general, to have and to exercise all the powers conferred by the laws of Delaware upon corporations formed under the laws of said State.

To purchase, hold and reissue any of the shares of its capital stock.

Fourth. The total authorized capital stock of this corporation is Forty Million Dollars ($40,000,000), divided into Four Hundred Thousand (400,000) shares of par value of One Hundred Dollars ($100) each.

The amount of capital stock with which this corporation will commence business is Thirty-three Million Dollars (33,000,000).

The names and places of residence of each of the subscribers to the capital stock are as follows:

[fol. 31] Name — Residence

William M. Barrett.....272 West 86th St., New York, N. Y.
George C. Taylor.....328 Cliff Ave., Pelham Heights, N. Y.
Burns D. Caldwell.....81 High Street, Orange, N. J.

The existence of this corporation is to be perpetual.

The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

The Directors shall have power to make and to alter or amend the By-laws; to fix the amount to be reserved as working capital, and to authorize and cause to be executed, mortgages and liens without limit as to amount, upon the property and franchises of this Corporation.

The By-laws shall determine whether and to what extent the accounts and books of this corporation (other than the stock ledger), or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right of inspecting any account, or book, or document of this Corporation, except as conferred by law or the By-laws, or by resolution of the stockholders.

The stockholders and directors shall have power to hold their meetings and keep the books, documents and papers of the corporation outside of the State of Delaware, at such places as may from time to time be designated by the By-laws or by resolution of the stockholders or directors.

The Directors shall have power, by a resolution passed by a majority vote of the whole Board, under suitable provision of the By-laws, to designate two or more of their number to constitute an Executive Committee, which committee shall, for the time being, as provided in said resolution or in the By-laws, have and exercise any or all the powers of the Board of Directors which may be lawfully delegated in the management of the business and affairs of the Corporation and shall have power to authorize the seal of the said Corporation to be affixed to all papers which may require it.

This corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by the statutes of the State of Delaware, and all rights conferred on officers, directors, stockholders herein are granted subject to this reservation.

We, the undersigned, for the purpose of forming a Corporation under the laws of the State of Delaware, do make, file and record this [fol. 32] Certificate, and do certify that the facts herein stated are

true; and we have accordingly hereunto set our respective hands and seals.

Dated at New York, June 20th, 1918.

William M. Barrett (Seal), George C. Taylor (Seal), Burns D. Caldwell (Seal).

In the presence of F. P. Small, T. B. Harrison.

STATE OF NEW YORK,
County of New York, ss:

Be it remembered, that on this twentieth day of June, 1918, A. D., personally appeared before me, the subscriber, a Notary Public, for the State of New York, William M. Barrett, George C. Taylor and Burns D. Caldwell, parties to the foregoing Certificate of Incorporation, known to me personally to be such, and severally acknowledged the said Certificate of Incorporation to be their act and deed, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

C. S. Cable, Notary Public. C. S. Cable, Notary Public, New York County. C. S. Cable, Notary Public, New York. New York County No. 306. New York County Register's No. 10245."

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Anderson: Now, if your Honor please, at this point, in view of the evidence before the Court, I want to move for an exclusion of the evidence introduced on the behalf of the plaintiff as it does not show any consolidation or merger of the two companies, and to charge the American Railway Express Company with the debt of the Southern Express Company under the evidence in the case would be [fol. 33] in violation of the Fourteenth Amendment of the Federal Constitution.

The Court: I overrule that motion.

Mr. Anderson: Exception noted.

The Court: Gentlemen, are you through with the testimony you are going to put in?

Mr. Anderson: Yes, except I would like to prove one other question, as to when the American Railway Express Company came in, if we can concede it.

NOTE.—By stipulation of counsel it is conceded that the American Railway Express Company began operations in the State of Virginia and elsewhere on the 1st day of July, 1918, and after that time the Southern Express Company no longer operated a transportation company in Virginia.

Mr. Collins: Under the record in this case, if your Honor please, it will be seen that this claim originated, as is shown here, in 1917, before they moved.

NOTE.—Record in the case of F. S. Royster Guano Company, a corporation, versus Southern Express Company, Incorporated, heretofore introduced in evidence as a part of this record, follows:

Memorandum—Exhibit in Evidence

"IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK, VIRGINIA

F. S. ROYSTER GUANO COMPANY, a Corporation, Plaintiff,

v.

SOUTHERN EXPRESS COMPANY, INCORPORATED, Defendant

Trespass on the Case. Damages, $600.00. 1 Dec. R., 1919

PRÆCIPE FOR SUMMONS

The Clerk of the Circuit Court for the City of Norfolk, Virginia, will please issue process as above and send process to Richmond, Virginia, for service on William F. Rhea, Chairman State Corporation Commission.

(Signed) Cadwallader J. Collin, p. q.

Filed Sept. 15/19."

[fol. 34] SERVICE

The Commonwealth of Virginia to the Sergeant of the City of Norfolk, Greeting:

We command you that you summon Southern Express Company, Incorporated, to appear at the Clerk's Office of our Circuit Court of the City of Norfolk, at the Rules to be holden for the said Court, on the first Monday in December, 1919, to answer F. S. Royster Guano Company, a Corporation, of a plea of trespass on the case, Damages $600.00.

And have then and there this writ.

Witness Laurence Waring, Clerk of our said Court, at his office, the 15th day of September, 1919, in the 144" year of our foundation.

Teste:

Laurence Waring, Clerk, by A. M. Layton, D. C.

(Reverse of Service)

John B. Hockaday, the lawfully appointed Agent upon whom may be served all lawful process against the within mentioned Southern Express Company, Incorporated, a foreign corporation, being no

longer a resident of the State of Virginia, and being absent from the State and no person residing in this State having been appointed in his place the within summons was executed on this 16th day of September, 1919, by delivering a true copy of the same to William F. Rhea, the Chairman of the State Corporation Commission, in person, in the city of Richmond, Virginia, in which city the said William F. Rhea resides, and by immediately transmitting a copy hereof by mail to said Southern Express Company, Incorporated.

(Signed) J. Herbert Mercer, Sheriff of the City of Richmond, by B. A. Braner, Depty. Sheriff.

Sheriff's fee, $1.00, paid."

[fol. 35] DECLARATION

"IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK, VIRGINIA

F. S. ROYSTER GUANO COMPANY, a Corporation, Plaintiff,

v.

SOUTHERN EXPRESS COMPANY, INCORPORATED, Defendant

F. S. Royster Guano Company, a corporation under the laws of Virginia, complains of Southern Express Company, Incorporated, a foreign corporation authorized to do business in Virginia, for this, to-wit: that the said defendant before and at the time of the delivery to it of the goods and chattels hereinafter mentioned was a common carrier of goods and chattels for hire from Richmond, in the State of Virginia, to Norfolk, in the State of Virginia, and while the defendant was a common carrier as aforesaid, the plaintiff heretofore, to-wit, on or about the 27th day of September, 1917, at Richmond, Virginia, caused to be delivered to the defendant two (2) Packages of Fertilizer Tax Tags of the value of four hundred and fifty dollars ($450.00), and one package of Fertilizer Tax Tag Hooks of the value of fifteen dollars ($15.00), to carry from said Richmond, Virginia, to said Norfolk, Virginia, and there to be delivered to the plaintiff for a certain reasonable reward to the said defendant in that behalf, and it then and there became and was the duty of the defendant to take due and proper care of said goods and chattels and in and about the carriage and conveyance of the same, and the delivery thereof as aforesaid.

Yet the defendant, not regarding its duty as such common carrier as aforesaid, did not deliver said two (2) Packages of Fertilizer Tax Tags to the plaintiff, but on the contrary thereof, so carelessly and negligently behaved and conducted itself in the premises, that by reason of the carelessness, negligence, and default of the defendant said two (2) Packages of Fertilizer Tax Tags and their contents, being of the value of four hundred and fifty dollars ($450.00), as aforesaid, were wholly lost to said plaintiff.

And the plaintiff claims of the defendant the sum of six hundred dollars ($600.00), for damages which have resulted from said carelessness, negligence and fault of said defendant.

(Signed) Cadwallader J. Collins, p. q.

Lodged 11/12/19.
Filed 1 Dec. R/19. L. W."

[fol. 36] MOTION TO QUASH

"IN THE CIRCUIT COURT OF THE CITY OF NORFOLK, VA.

F. S. ROYSTER GUANO COMPANY

vs.

SOUTHERN EXPRESS COMPANY

Motion to Quash the Service of the Writ in This Case and the Return Thereon and to Dismiss the Action

The Southern Express Company, a corporation, appearing specially and only specially and solely to move the Court to quash the service and writ in this action and the return thereon, prays the judgment of this honorable court on said motion to quash whether it ought to be required to appear in accordance with said process or service thereof, upon the Hon. William F. Rhea, Chairman of the State Corporation Commission of Virginia, because it says:

(1) That said writ and the return thereon is not proper and lawful.

(2) That at the time of and before the service of said process it had no Agent in this state on whom said notice of motion could be lawfully served and at the time of the aforesaid attempted service of said writ, it was not carrying on its business in the state of Virginia, and does not accept or waive service of said writ.

(3) The said defendant still appearing specially and only specially for the foregoing reasons, moves the Court to dismiss said action.

(Signed) Wyndham R. Meredith, p. q.

Filed Nov. 18/19. LW."

JUDGMENT

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK ON THE 15TH DAY OF MAY, 1920

F. S. ROYSTER GUANO COMPANY

vs.

SOUTHERN EXPRESS COMPANY

[fol. 37] This day came the plaintiff by its attorney, and thereupon the defendant being solemnly called, came not, and the plaintiff not demanding a jury, the court proceeded to hear the evidence and try the case. Whereupon it is considered by the court that the plaintiff recover against the defendant the sum of four hundred and fifty dollars, with legal interest thereon from the 15th day of May, 1920, till paid, and its costs by it about its suit in this behalf expended.

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

VIRGINIA:

IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

BILL OF EXCEPTION NO. 3 AND ORDER SETTLING SAME

During the course of the trial of this cause the plaintiff offered in evidence the entire record in the case of F. S. Royster Guano Company vs. Southern Express Company, including final judgment rendered in the sum of $450.00 on the 15th day of May, 1920, including the cost, to the introduction of which record the defendant objected on the grounds that the judgment is not valid for lack of proper process, which objection the Court overruled to which ruling of the Court the defendant excepted.

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

[fol. 38] BILL OF EXCEPTION NO. 4 AND ORDER SETTLING SAME

After the introduction of the evidence on behalf of the plaintiff and the defendant, the defendant moved the Court for the exclusion of the evidence introduced on behalf of the plaintiff on the grounds that it

failed to show a merger or consolidation of the Southern Express Company and the American Railway Express Company and the defendant's evidence showed that there was not a merger or consolidation of the two companies, and that to charge the American Railway Express Company with the debt of the Southern Express Company under the evidence introduced would be in violation of the Fourteenth Amendment of the Federal Constitution, which motion the Court overruled and to which ruling of the Court the defendant excepted.

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

IN CIRCUIT COURT OF CITY OF NORFOLK

[Title omitted]

BILL OF EXCEPTION NO. 5 AND ORDER SETTLING SAME

After the introduction of the evidence and argument of counsel the Court took the case under advisement and after having given consideration to the issues involved, entered judgment against the defendant in favor of the plaintiff for the sum of $461.40, with interest on $450.00 from May 15, 1920, whereupon the defendant moved the Court for a rehearing on the grounds that the judgment was contrary to the law and the evidence and in violation of the Fourteenth Amendment to the Federal Constitution, which motion the Court overruled and to which ruling of the Court the defendant excepted.

Teste this 23 day of May, 1923, and within the sixty days allowed by law.

Allan R. Hanckel, Judge.

[fol. 39] IN CIRCUIT COURT OF CITY OF NORFOLK

CLERK'S CERTIFICATE

I, Laurence Waring, Clerk of the Circuit Court of the City of Norfolk, do certify that the foregoing is a true transcript of the record in the suit of F. S. Royster Guano Company, a corporation, plaintiff, against American Railway Express Company, a corporation, defendant, lately pending in said Court.

I further certify that the same was not made up and completed and delivered until the plaintiff had received due notice thereof, and of the intention of the defendant to apply to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to the judgment therein.

Teste:

Laurence Waring, Clerk, by A. M. Brown, D. C.

Fee for transcript: $18.25.

A copy—Teste: H. Stewart Jones, C. C.

[fol. 40] In the Special Court of Appeals, Held at the Library Building, in the City of Richmond

AMERICAN RAILWAY EXPRESS COMPANY, Plaintiff in Error,

against

F. S. ROYSTER GUANO COMPANY, Defendant in Error

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of the City of Norfolk on the 13th Day of April, 1923

ARGUMENT AND SUBMISSION—Dec. 12, 1924

This case was this day fully heard upon a transcript of the record of the judgment aforesaid and arguments of counsel; but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A Copy.
Teste:

H. Stewart Jones, C. C.

[fol. 41] IN SPECIAL COURT OF APPEALS

[Title omitted]

JUDGMENT—Feb. 26, 1925

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also its costs by it expended about its defence herein.

Which is ordered to be certified to the said circuit court.

A copy.
Teste:

H. Stewart Jones, C. C.

Defendant in Error's Costs

Attorney's fee	$20.00
Clerk's small fees	2.59
	$22.59

Teste:

H. Stewart Jones, C. C.

[fol. 42] IN SPECIAL COURT OF APPEALS

JUDGE'S CERTIFICATE TO CLERK

I, Beverly T. Crump, President of the Special Court of Appeals of the State of Virginia, hereby certify that H. Stewart Jones, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing the same, Clerk of said court, duly commissioned and qualified.

Beverly T. Crump, President of the Special Court of Appeals of Virginia.

CLERK'S CERTIFICATE TO JUDGE

I, H. Stewart Jones, Clerk of the Special Court of Appeals of the State of Virginia, hereby certify that Beverly T. Crump, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing the same, President of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court this 30th day of March, 1925.

H. Stewart Jones, Clerk of the Special Court of Appeals of Virginia. (Seal Supreme Court of Appeals of Virginia, Richmond.)

[fol. 43] IN SPECIAL COURT OF APPEALS

CLERK'S CERTIFICATE

I, H. Stewart Jones, Clerk of the Special Court of Appeals of the State of Virginia, do hereby certify that the foregoing are true and accurate copies of the record and papers in the case of American Railway Express Company against F. S. Royster Guano — on file and of record in my said office.

Witness my hand and seal of said court this 30th day of March, 1925.

H. Stewart Jones, Clerk. (Seal Supreme Court of Appeals of Virginia, Richmond.)

Plaintiffs' costs, 23.69.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 8, 1925

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

It is further ordered that this cause be, and the same is hereby, advanced and assigned for argument with No. 268 heretofore assigned for Monday, November 2d next, as one case.

No. 1[redacted]477

IN THE

Supreme Court of the United States,

In the Matter

of

The Petition of the AMERICAN RAILWAY EXPRESS COMPANY,

Petitioner,

—against—

F. S. ROYSTER GUANO COMPANY, a corporation,

Respondent,

for a Writ of Certiorari to the Special Court of Appeals of the State of Virginia to bring before the Supreme Court the case of F. S. ROYSTER GUANO COMPANY, a corporation,

Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,

Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

CHARLES W. STOCKTON,
Attorney for Petitioner,
No. 2 Rector Street,
New York City.

Court Press, N. Y. C. Bowling Green, 2820

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IN THE

Supreme Court of the United States,

In the Matter

of

The Petition of the AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner,

—against—

F. S. ROYSTER GUANO COMPANY, a corporation,
Respondent,

for a writ of certiorari to the Special Court of Appeals of the State of Virginia to bring before the Supreme Court the case of F. S. ROYSTER GUANO COMPANY, a corporation,

Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,
Defendant-Appellant.

Motion for Writ of Certiorari.

Now comes the petitioner above named by Charles W. Stockton, its attorney, and moves this Court upon a certified copy of the transcript of the record herein and upon the annexed petition verified the 1st day of May, 1925, for a writ of certiorari addressed to the Special Court of the State of Virginia to bring before this Court the case of American Railway Express Company, defendant-appellant, against the F. S. Royster Guano Company, plaintiff-respondent, recently decided

by the Special Court of Appeals of the State of Virginia, for such proceedings herein as to the Court may seem just, and for such other and further relief in the premises as may be just.

CHARLES W. STOCKTON,
Attorney for Petitioner,
Office and Post Office Address,
2 Rector Street,
Borough of Manhattan,
City of New York.

K. E. STOCKTON,
Of Counsel.

Petition for Writ of Certiorari.

UNITED STATES SUPREME COURT.

In the Matter

of

The Petition of the AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner,

—against—

F. S. ROYSTER GUANO COMPANY, a corporation,
Respondent,

for a writ of certiorari to the Special Court of Appeals of the State of Virginia to bring before the Supreme Court the case of F. S. ROYSTER GUANO COMPANY, a corporation,

Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,
Defendant-Appellant.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows as follows:

First: This is a petition for a writ of certiorari to review a judgment obtained in the Special Court of Appeals of Virginia, holding the petitioner American Railway Express Company liable for a judgment rendered against the Southern Express Company on the 15th day of May, 1920, in a suit against the Southern Express Company to which the American Railway Express Company was not a party, to recover damages for the loss of merchandise claimed to have been shipped by the Royster Guano Company from Richmond, Vir-

ginia, to Norfolk, Virginia, on September 26, 1917, via the Southern Express Company. Decision was based upon the fact that prior to the judgment, on or about July 1, 1918, the petitioner bought from the Southern Express Company all of its property used in its domestic express transportation business in the State of Virginia and elsewhere, paying therefor in petitioner's capital stock at par for said property (R. 21).

Second: Your petitioner is a corporation organized in the year 1918 under the laws of the State of Delaware pursuant to a contract theretofore entered into between the Government of the United States by the Director General of Railroads and the Adams Express Company, American Express Company, Southern Express Company and Wells Fargo & Company (R. 25).

Third: The Southern Express Company is a foreign corporation formerly doing business in Virginia up to July, 1918 (R. 33).

Fourth: This action was brought to recover from the petitioner the amount of a judgment rendered against the said Southern Express Company. Said judgment was rendered in May, 1920, in an action brought in the Circuit Court of the City of Norfolk, in which summons issued on the 15th day of September, 1919, and return was made thereon of the service of summons upon William F. Rhea, Chairman of the State Corporation Commission, no authorized agent of the Southern Express Company being found within the state (R. 34-35).

Fifth: The complaint in the present action alleges the recovery by the F. S. Royster Guano Company, a corporation organized under the laws of the State of Virginia of a judgment for the sum of $450 damages,

with interest and costs, and that before said judgment and on or about July 1, 1918, the petitioner took over from the said Southern Express Company all of the property theretofore belonging to it then owned and used by the said Southern Express Company in its express business throughout the United States, including all of such property in Virginia, issuing therefor to the Southern Express Company or its stockholders the stock of the petitioner, by means whereof the assets of the Southern Express Company have been distributed among its stockholders to the exclusion and prejudice of its creditors (R. 16).

Fifth: A conditional judgment was entered against the petitioner by default which on October 9, 1922, was set aside and issue joined, and the defendant under leave filed a special plea that execution was not issued on the judgment within the period of limitation allowed by the laws of the State of Virginia, and answered *nil debet*. On November 6, 1922, on motion of the plaintiff the special plea was stricken out to which the defendant excepted, and on April 13, 1923, judgment was rendered against the petitioner in the sum of $461.40 with interest on $450 from May 15, 1920, and costs. Whereupon the defendant moved to set aside the judgment and grant a rehearing which motion was overruled, to which ruling defendant excepted (R. 17-18).

Sixth: Thereafter petitioner appealed from the judgment of the Circuit Court of the City of Norfolk to the Special Court of Appeals of Virginia. Said appeal came on for a hearing upon the petitioner's exceptions as follows:

1. That the cause of action was founded on a judgment upon which execution was not issued

within the period of limitation allowed by the laws of the State of Virginia (R. 19).

2. That the judgment upon which this action was based was not a valid judgment, service of process not having been properly obtained upon the Southern Express Company and that the Southern Express Company at the time of the service had withdrawn from the State of Virginia and was no longer "a foreign corporation doing business in the State of Virginia" upon which service could be obtained by service on the Chairman of the Corporation Commission (R. 20).

3. That in the trial of the case the plaintiff placed in evidence the entire record in the case of *F. S. Royster Guano Company* v. *Southern Express Company* including the final judgment, over the objection of petitioner that said judgment was not valid for lack of jurisdiction, in that service of process had not been made on the Southern Express Company (R. 20).

4. That the evidence introduced on behalf of the plaintiff failed to show a merger or consolidation of the Southern Express Company and the American Railway Express Company, and that petitioner's evidence showed that there was no merger or consolidation of the two companies and that to charge the American Railway Express Company with the debt of the Southern Express Company under the evidence introduced would be in violation of the Fourteenth Amendment of the Federal Constitution (R. 21-22, 23, 24, 25, 26, 27).

5. That the judgment entered against petitioner in favor of the appellee was contrary to law and to the evidence and in violation of the Four-

teenth Amendment of the Federal Constitution, and that petitioner was entitled to a rehearing which rehearing was denied by the Court (R. 12-13-14).

Seventh: On February 26, 1925, the Special Court of Appeals of the State of Virginia in an opinion (copy annexed) affirmed the judgment of the Circuit Court of the City of Norfolk. Said Court of Appeals is the highest court of the State of Virginia and is the highest court of the State of Virginia in which a decision of this court can be had.

Eighth: Your petitioner was organized under the following conditions: prior to June 30, 1918, the Adams Express Company, American Express Company, Southern Express Company and Wells Fargo & Company were all engaged in the express transportation business in the United States. Said express companies were competitors and one or more of them operated in practically every State in the United States. Said express business required for its operations long term contracts with various connecting railroad lines by which said railroad lines transported on passenger train schedule the shipments entrusted to said express companies for transportation, and also required said express companies to have offices located in every city in the United States, at which it was necessary to have horses, trucks and other equipment used in the express transportation business (Record, p. 25).

On December 28, 1917, the President of the United States acting under the war powers vested in him by Congress, took over practically all the railroad lines in the United States, vesting the possession and control thereof in his agent W. G. McAdoo, Director General of Railroads.

Said W. G. McAdoo, as Director General of Railroads refused to continue the performance of the contracts between the various express companies above named and the companies owning the railroad lines under his control and refused to make any new agreements for railroad transportation service with the said express companies severally. However, he offered to deal with a single corporation if the said express companies would transfer to it their operating equipment and personnel, used in the operation of a domestic express business (Record, pp. 24-25). The Southern Express Company at first refused to turn over its property to a single Company as required, whereupon the Director General, through his representative, Mr. Prouty, stated that if the Southern did not transfer its property he would see that its rates were lowered which was within the power of the Director General. The Southern Express Company preferred to take money for its property but the plan of organization of the American Railway Express Company approved by the Director General contemplated only the issue of stock for the property and the Southern Express Company was compelled to accept stock and to contribute $300,000 in cash to the working capital of the American Railway Express Company.

The transfer by the Southern Express Company only included real estate and equipment used in the express business and did not include any franchises (Record, p. 26). The entire organization of the American Railway Express Company was under supervision of the Director General of Railroads (Record, p. 25). The transfer was not one of choice and was only made in order to secure as near as possible the physical value of the property transferred; *i. e.,* taking stock of the American Railway Express Company at par for the property at its book value less depreciation (Record,

p. 25). The Southern Express Company retained real estate not used in express operations, together with treasury assets of approximately $1,000,000 (Record, p. 26). The amount of property sold by the Southern to the petitioner (including $300,000 cash for working capital) was $1,750,000 (Record, p. 27). The total stock issued by the American Railway Express Company was $34,642,000.

Ninth: Petitioner has never, either in writing or orally, assumed any of the obligations or liabilities of the said Southern Express Company and has never assumed the performance of any of its contracts or paid from its own funds any of the obligations or liabilities of the Southern Express Company (Record, p. 27). The petitioner did not at any time enter into any agreement with the Southern Express Company or others by the terms of which it was to carry on the express transportation business theretofore transacted by the Southern Express Company (R. 21).

Tenth: There has been no legal merger or consolidation of the said Southern Express Company into your petitioner. The affairs of the petitioner are managed and controlled by a board of twelve directors of whom only four are in any way connected with the Southern Express Company. None of the officers or employes of the petitioner are officers or employes or in any way connected with the Southern Express Company (Record, p. 26). Less than one-sixteenth of the capital stock of the petitioner is owned by the Southern Express Company (R. 27).

Petitioner is informed and believes that on June 30, 1918, said Southern Express Company owned a large amount of real and personal property which was not directly connected with the express business and which

was never transferred to the petitioner; and that at that time the estimated value of the total gross assets of the Southern Express Company was approximately $2,750,000 of which the value of the equipment used in the operation of an express business and cash transferred to the petitioner was only $1,750,000 (Record, p. 26). Since June 30, 1918, the said Southern Express Company has maintained offices in the City of New York, State of New York at which its executive offices are located (Record, p. 27); it has not distributed the stock received from the petitioner or any other capital assets to its stockholders (Record, p. 26) and at all times since June 30, 1918, the said Southern Express Company has been solvent and able to pay all legal claims against it (R. 28).

Eleventh: The questions of constitutional law involved in this application are:

1. Whether it is a lack of due process of law to take the property of the petitioner to satisfy a claim founded on a judgment rendered against another foreign corporation which had withdrawn from the state prior to the suit against it and had no agents within its borders.

2. Whether the petitioner solely by reason of its purchase of property of the Southern Express Company, a foreign corporation doing an interstate business in Virginia can be held liable for a judgment against the Southern Express Company brought more than a year after the purchase of the property by the petitioner in which action the petitioner had no notice and it was not a party.

3. Whether the state court of Virginia by judicial decision may, in the exercise of the

police power of the state, without statutory authority, create a new rule of law impairing vested rights which would be unconstitutional if enacted by the state legislature.

4. Whether it is a lack of due process of law within the meaning of the federal constitution for the courts of Virginia to enforce retroactively a new rule that a *bona fide* purchaser for value of all of the Virginia property of a solvent vendor is liable to Virginia creditors of the vendor to the extent of the property acquired.

5. Whether the courts of Virginia by service of summons on the Chairman of the State Corporation Commission acquired jurisdiction over a foreign corporation which had withdrawn from the state more than a year prior to the institution of the suit.

Your petitioner further avers that the present case is one for which it is proper for this court to issue a writ of certiorari for the following reasons, if no others:

(a) The decision of the state court denying the asserted federal right and depriving the petitioner of its property is without support in the record and is contrary to undisputed testimony in the record;

(b) The decision of the state court denies to the petitioner the equal protection of the law and takes its property without due process of law, in that it attempts to create by judicial decision a rule of law that would be unconstitutional if enacted by the state legislature;

(c) The decision of he state court deprives the petitioner of its property without due process of

law because it places harsh and unreasonable penalties upon the freedom of contract and the acquisition ad alienation of property;

(d) The decision of the state court deprives the petitioner of its property without due process of law, because it gives extra territorial effect to a statute of the state arbitrarily conferring the power to accept service of process for a foreign corporation not within the state without the consent of such corporation;

(e) The decision of the state court deprives the petitioner of its property without due process of law because it gives effect to a void judgment against the Southern Express Company which did not have its day in court;

(f) The decision of the state court is obnoxious to the federal constitution in that it applies retroactively a new rule of law impairing vested rights.

(g) The case is of great importance to the petitioner because of the possibility of it being held liable in many states for obligations or liabilities of the Southern Express Company, American Express Company, Adams Express Company or Wells Fargo & Company whose property it bought under similar circumstances.

(h) The case is of great public importance because of a conflict of judicial decisions by the courts of several states; because of the novelty of the rule adopted by the state court and the far-reaching effect that its adoption may have on commercial and corporation law; and the acquisition or alienation of property.

WHEREFORE your petitioner prays that this court will be pleased to grant a writ of certiorari in this case

to the Special Court of Appeals of the State of Virginia to bring up this case to this Honorable Court and for such proceedings therein as to this Honorable Court may seem just.

AMERICAN RAILWAY EXPRESS COMPANY,
By CHARLES W. STOCKTON,
Attorney for Petitioner,
2 Rector Street, New York City.

KENNETH E. STOCKTON,
Of Counsel.

State of New York,
County of New York—ss.:

E. R. MERRY, JR., being duly sworn, says that he is the secretary of the American Railway Express Company, the petitioner herein; that he has read the foregoing petition and knows its contents; that the same is true to the best of his knowledge and belief; that his knowledge and belief are based upon the records in this case, his general knowledge of the affairs of the company and statements made to him by counsel in the case.

E. R. MERRY, JR.

Sworn to before me this
1st day of May, 1925.

A. P. Rose

NOTARY PUBLIC, BRONX COUNTY
CLERK'S No. 40 REGISTER'S NO. 2609 D
CERTIFICATE FILED IN NEW YORK COUNTY
CLERK'S NO. 63 REGISTER'S NO. [illegible]
MY COMMISSION EXPIRES MARCH [illegible]

Certificate of Counsel.

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

CHARLES W. STOCKTON,
Attorney for Petitioner.

IN THE

Supreme Court of the United States.

In the Matter

of

The Petition of the AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner,

—against—

F. S. ROYSTER GUANO COMPANY, a corporation,
Respondent,

for a writ of certiorari to the Special Court of Appeals of the State of Virginia to bring before the Supreme Court the case of F. S. ROYSTER GUANO COMPANY, a corporation,

Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,
Defendant-Appellant.

BRIEF IN SUPPORT OF APPLICATION FOR A WRIT OF CERTIORARI.

Statement.

This is an application to review by certiorari a judgment of the Special Court of Appeals of Virginia, affirming a judgment in favor of the plaintiff-respondent in an action brought by F. S. Royster Guano Company against the petitioner American Railway Express Company. This action was brought to hold the American Railway Express Company liable for the amount of a judgment theretofore secured by plaintiff-respondent

against the Southern Express Company, the petitioner having purchased the physical property used by the Southern Express Company in its domestic express business in Virginia and elsewhere. The existence of the petitioner and its purchase of the Southern Express Company's property arose from the action of the Executive branch of the United States Government during a state of war in furtherance of the belief that complete unification of inland transportation was necessary to the successful prosecution of the war (R. 24).

On December 28, 1917, the President of the United States acting under the power conferred on him by vote of Congress, took possession and assumed control of practically all the railroad lines in the United States and appointed as his agent in charge thereof Wm. G. McAdoo, as Director General of Railroads.

The Southern Express Company and three other companies had been operating over these lines under long term contracts and immediately made application to the Director General of Railroads to ascertain whether they had been taken over with the railroad lines. The Director General finally held that he had not taken over the express companies and declared he would not do so. He indicated that he would be willing to deal with a single company which would operate all over the United States. The Southern Express Company refused to agree to turn over its property to such a single company as it preferred to operate for itself, or to have the company taken over under Federal control. The representative of the Director General, dealing with the Southern, said that he could make the Southern transfer its property to the single company to be formed, and indicated that if it did not, it would have its rates lowered which it was within the Director General's power (R. 24).

The Southern Express Company, being confronted

with such an emergency, under practical compulsion transferred its property to the American Railway Express Company, but the transfer was not one sought by it and was only made in order to secure as nearly as possible the physical value of the property transferred (R. 24).

On July 1, 1918, the petitioner began doing an express business in Virginia and elsewhere and the Southern Express Company withdrew from the State of Virginia and ceased doing business within that state (R. 33).

On September 15, 1919, the F. S. Royster Guano Company brought suit in the Circuit Court of the City of Norfolk against the Southern Express Company and the summons in such proceeding was served upon Hon. W. F. Rhea, Chairman of the Corporation Commission of Virginia (R. 34).

The Southern Express Company appeared specially and moved to quash on the ground that it was not carrying on its business in Virginia and had no agent in the State upon whom service could be made which motion was denied and at a later period judgment was entered against the Southern Express Company by default which judgment lay dormant for about two years, no execution being taken out on same; but in July, 1922, the plaintiff in the before mentioned case filed a declaration in *assumpsit* against the petitioner American Railway Express Company, alleging liability against the Southern Express Company (R. 36-39).

This declaration (Record, 16) set forth that the F. S. Royster Guano Company had recovered a judgment against the Southern Express Company which remained in full force and effect and unpaid; that prior to such judgment the American Railway Express Company took over from the Southern Express Company all the property theretofore belonging to it then owned and used by the Southern Express Company in its business through-

out the United States, including all its property in Virginia, issuing therefor to the said Southern Express Company or to its stockholders stock of the American Railway Express Company by means whereof the assets of the said Southern Express Company have been distributed among its stockholders to the exclusion and prejudice of its creditors.

Upon the trial of the case the only affirmative evidence introduced by the plaintiff was that the American Railway Express Company bought from the Southern Express Company all of the tangible property used by the Southern in its express business and paid for the same with capital stock at par (R. 22-26).

The evidence introduced by the plaintiff also showed that no agreement had been entered into at any time between the American Railway Express Company and the Southern Express Company by which it was to carry on an express transportation business theretofore transacted by the Southern; that the petitioner did not take over the business of the Southern Express Company on the 1st of July or at any time (R. 22).

The petitioner affirmatively showed by undisputed testimony that the Southern Express Company, exclusive of stock received from the petitioner, retained real estate and treasury assets of approximately $1,000,000; that the Southern Express Company had not liquidated itself or distributed any of its property or stock of the American Railway Express Company to its stockholders; that there had been no distribution of any kind to the stockholders; that the stock of the American Railway Express Company received by the Southern was still in its possession; that no officer or director of the Southern Express Company was an officer of the petitioner; that there was no voting trust or other agreement by which the Southern controlled the policy of the petitioner, and that there was

no contract between them under which the Southern agreed to reimburse the petitioner; that the Southern Express Company still maintains its corporate existence with offices in New York at which it has officers who are authorized to accept service in suits against it; that the Southern Express Company has ample assets to meet all remaining outstanding claims against it (R. 26-27).

Upon this record the Circuit Court of the City of Norfolk held the petitioner liable for the judgment recovered by the plaintiff-respondent against the Southern Express Company and the Special Court of Appeals affirmed such judgment (R. 35).

The following grounds appear in the opinion of the Special Court of Appeals of Virginia for its decision:

> (1) That the validity of the judgment of the Circuit Court of the City of Norfolk rendered by default against the Southern Express Company, a foreign corporation which had withdrawn from the State of Virginia and upon which service of process had not been made, and to which action petitioner was not a party, could not be questioned by petitioner in an action to hold it liable on said judgment in any court of Virginia;
>
> (2) That the property of the Southern Express Company within the State of Virginia was impressed with a trust for the benefit of Virginia creditors;
>
> (3) That the American Railway Express Company was guilty of constructive fraud in the purchase of this property in exchange for its own stock and was not a *bona fide* holder for value so as to cut off rights of general creditors of the Southern Express Company to follow this property for the satisfaction of their claims.

The petitioner's contention is that the decision of the State Court deprives it of its property without due pro-

cess of law and denies to it the equal protection of the law in that:

(1) It proceeds upon a principle of law based upon assumptions of fact which are unsupported by the record;

(2) That it attempts to do by judicial decision what would be unconstitutional in a statute of similar effect;

(3) That the decision is contrary to the established principles of common law and is an attempt at judicial legislation under the police power of the State which cannot be retroactively applied to affect vested rights;

(4) That it deprives the petitioner of its property without due process of law in that the alleged judgment upon which the instant case is based was null and void in that no service of process was made upon the Southern Express Company;

(5) That it deprives the petitioner of its property without due process of law in that it admits in evidence the record including the judgment, in a former adjudication and of which it had no notice of a suit brought after the transfer of the property, to which the petitioner was not a party.

POINT I.

The basis of fact upon which the Special Court of Appeals of Virginia rests its decision denying the asserted federal right has no support in the record.

There is no conflict in the testimony offered in this case. The action was brought against the petitioner charging that the Southern Express Company had sold its property to the petitioner for stock of the petitioner

issued to it or its stockholders and had distributed its assets among its stockholders to the exclusion and prejudice of its creditors. The proof showed that the stock of the petitioner issued to the Southern Express Company was never distributed to its stockholders and that the Southern Express Company had distributed none of its assets to its stockholders in dividends or otherwise. Petitioner bought from the Southern Express Company the physical property theretofore used by the Southern in its domestic express business in Virginia and elsewhere and paid for it in its own stock at par. The Court in its decision says:

> "It is uncontroverted that the Southern Express Company turned over its business and property used in its business, along with another express company, for its proportionate share of the stock of the defendant and ceased to do an express business, nor were any assets left in the State of Virginia to pay the obligations of the Southern Express Company."

The proof shows that the Southern Express Company did not sell its business nor did the petitioner undertake to carry on its business in Virginia or elsewhere, and it is clearly established that independent of the stock of petitioner received by the Southern Express Company, it had approximately $1,000,000 in assets which were amply sufficient to meet all of its legal liabilities.

The Court held that the law in Virginia in reference to the merger of the Southern Express Company and others into the petitioner as a consolidated company liable for the debts of the constituent companies had already been settled by the case of *American Railway Ex-*

press Company v. *Downing,* 132 Va. 139, and quotes the following from that case:

> "When two or more corporations are consolidated into a new corporation with a new name and the constituent corporations go out of existence, if no arrangements are made respecting their property and liabilities, the consolidated corporation will be answerable for their liabilities, at least to the extent of the property acquired from the constituent corporation whose liability is sought to be enforced against the consolidated corporation * * *.
>
> It is not essential to the liability of the corporation for the debts and claims against its constituent corporation that the constituent company cease to exist *de jure* upon the organization of the new corporation. The going out of existence of the constituent company is the cessation of all actual transactions of business as a going concern; its continued existence *de jure* for the purpose of winding up its affairs is immaterial.
>
> The principles upon which the cases are based are that the assets of the constituent corporations are a trust fund for the payment of their debts, and when the consolidated corporation takes over the assets in exchange for stock and bonds, there is an implied contract in law to pay such debts out of the assets."

It is clear, therefore, from the opinion of the Court that its decision is fundamentally based upon facts which do not appear in the record here. The *Downing* case was one in which the petitioner was sued upon a liability of the Adams Express Company, in the record of which no facts as to the relations of the petitioner and the Southern Express Company appear, and in which case no federal question was raised. In order for the law applying to the instant case to be settled in Virginia by the *Downing* case, *supra,* it would be necessary for the

record in the instant case to show: First, that the Southern Express Company sold its business as well as all of its property to and had merged into or consolidated with the petitioner; second, that the Southern Express Company went out of existence, leaving no assets or insufficient assets to pay its debts.

The record in the instant case shows that the Southern Express Company was not merged in or consolidated with the petitioner; that it still retains its independent corporate existence with ample assets to meet its liabilities; and has never made any distribution to its stockholders of any kind whatsoever. It seems clear, therefore, that the basis of the Virginia Court's decision has no support in the record.

The principles of law quoted but misapplied by the Virginia Court are of course well established by a long line of fairly uniform and consistent decisions constituting the so-called trust fund theory devised by the Courts to protect the creditors of a corporation against any distribution of assets to stockholders in fraud of creditors; and the principles underlying all of the cases is that where stockholders invest their money in a corporation's shares and substitute a limited liability as stockholders for the full liability of an individual, the capital stock of the corporation becomes a trust fund for the payment of creditors who must be satisfied *before a stockholder can withdraw* any portion of the capital so invested, and the assets so distributed may be followed into the hands of the shareholders or any person other than a *bona fide* purchaser for value.

This general impression, however, that the capital stock of the corporation becomes a trust fund applies *only* where a corporation is insolvent or is in process of dis-

solution. As said by Mr. Justice Brewer in *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371:

> "While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pomeroy's Equity Jurisprudence, Section 1046, they 'are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor.'
>
> To the same effect are decisions of this court. * * * In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as an individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." *Graham* v. *Railroad Co.*, 102 U. S. 148.

Wabash, St. Louis & Pacific Ry. Co. v. *Ham*, 114 U. S. 587;

Fogg v. *Blair*, 133 U. S. 534.

Again in the same decision, at page 385, the Court says:

> "A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mis-management in respect thereto; but as between itself and its creditors the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case."

This view has been followed generally. In *Pusey & Jones Co.*, 261 U. S. 491, it is said:

> "But an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied, he may proceed in equity by a creditors' bill."

In *Graham* v. *La Crosse and Milwaukee Railroad Co.*, 102 U. S. 148, it is said:

> "The contention that while an individual has supreme dominion over his property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors, is not

> sound. * * * The corporation is a distinct entity entitled to hold property exactly as an individual can hold it."

In *McDonald* v. *Williams,* 174 U. S. 397, this Court said:

> "When a corporation is solvent the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation."

There are many instances of fraudulent conveyances in which the trust fund doctrine has been referred to as the basis for permitting a creditor to follow property conveyed without consideration in fraud of creditors. As this Court said in *Wabash, St. Louis & Pacific R. R. Co.* v. *Ham,* 114 U. S. 587:

> "The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void."

Under these well established principles of law, for the Virginia Court to hold the petitioner liable for debts or liabilities of the Southern Express Company it would be necessary for the record to show (1) that there was

an actual consolidation or merger under which the Southern Express Company became extinguished and the petitioner either expressly or by necessary implication of law undertook to pay its debts or liabilities; or, (2) that the Southern Express Company was insolvent and that the transfer of the property to the petitioner was a fraudulent conveyance without consideration to defeat the creditors of the Southern Express Company.

The record clearly shows that there was no actual merger or consolidation of the Southern Express Company with the petitioner under the usual tests, either by purchase of the stock of the Southern or by purchase of all or substantially all of its property by which the Southern went out of existence and the shareholders became shareholders of the petitioner, or that the Southern Express Company at the time of the sale was insolvent. None of these facts appears in the record. Upon the contrary it is clearly shown that the petitioner bought a certain part of the property of the Southern and paid for it in its own stock, the property remaining in the Southern's corporate possession being ample to pay all of its liabilities, and none of the property of the Southern being distributed to its shareholders. As to actual fraud, this would seem impossible from the record, nor do we understand that any such charge is made. The Director General of Railways acting under the authority of the President of the United States conceived that it was necessary to unify the express service of the country as the railroads had already been unified to meet the needs of the nation in time of war. He could not permit the unified railroads to be hampered by the several express companies in such an emergency and he required all of them to cease their operations over the railroads controlled by him and practically constrained them to sell such of their property as was neces-

sary to his purpose to the petitioner and a corporation formed under his supervision.

The payment for the property was in stock according to his requirements. He refused to pay cash. If, therefore, actual fraud be charged on this record, it must be the fraud of the Director General since all of the terms of the sale were not only suggested but practically enforced by him. It is, of course, apparent that the Director General could not possibly have benefitted from any actual fraud and, since the petitioner and the Southern Express Company both acted under his constraint in the entire transaction, it would seem that actual fraud cannot be deduced from anything in the rocord.

As to constructive fraud, it would seem necessary, in order to support such a charge, that there must be some circumstances in the case to indicate that the petitioner has in its possession assets of the Southern Express Company which it cannot, in equity and good conscience, retain; and these assets must be subject to an equitable claim of the plaintiff and creditors of the Southern Express Company; or, in other words, it must appear that the petitioner is not a *bona fide* purchaser for value if the Virginia Courts be held to be right in their judgment. It very clearly appears in the instant case that the Southern Express Company did not by the sale of its property to the petitioner place itself in a position to prejudice the interests of its creditors or to substantially impair their remedy against it, since the Southern Express Company as a corporate entity after the transaction was completed, was in as good, if not a better, position financially to meet its liabilities than it would have been had it refused to sell its property to the petitioner: because, as clearly appears from the evidence, it would have been left with its property scattered throughout a number of states in small quanti-

ties which could not have been readily disposed of except to someone engaged in the same line of business and, as also shown by the record, it was impossible for any one to engage in the express business at this time without the consent and approval of the Director General who controlled all of the railroad facilities necessary to that business. The Southern Express Company by its acceptance of the Director General's decision sold its property for its approximate cash value and received therefor stock of the petitioner which certainly must have represented a greater value in the aggregate than the scattered items of property usable only in the express business had the Southern undertaken to sell its property to others. It cannot, therefore, be said upon the record that the sale of this property to the petitioner in any way impaired the rights of creditors of the Southern Express Company.

It would seem that the Virginia Court in the instant case has been misled primarily by the fact that the petitioner paid for the property purchased with its own stock instead of cash, and it may readily be that this error has arisen primarily from the fact that in practically all of the cases in which one corporation has been held liable for the debts of another under the trust fund theory, there has been no real change of ownership, but merely a change in the *form* of ownership, the purchasing company paying for the assets of the extinct corporation in its stock which was distributed to the stockholders of the extinct corporation in place of their stock in the extinct company, so that the stockholders of the old corporation became stockholders of the new corporation, and there was no *bona fide* purchase or sale of assets, but simply a change in the name, under the control of the same parties in the new corporation who were in control of the old corporation.

It may be said that the authorities quoted by the Virginia Court rest upon just such cases where the transfer of property was not a *bona fide* sale, and really not any change of ownership, but merely a change in form designed to defeat and defraud creditors, and this has been rightly recognized by the Courts as fraud. It does not, however, as apparently assumed by the Virginia Court, necessarily follow that in every transaction in which stock of the purchasing corporation is issued in payment for the property of the debtor corporation, the transaction is not a *bona fide* purchase and sale or that the rights of the creditors are prejudiced by the transaction.

We submit, in all confidence, that in none of these cases will be found authority for the proposition that the purchasing corporation may be held liable for the debts and liabilities of the debtor corporation where the transaction entered into left the creditors of the debtor corporation in a position to enforce against it the payment of its liabilities and where there were ample assets in its hands to meet such liabilities.

It is true that where stock given for the property has been distributed to the stockholders of the debtor corporation, and no other assets were found to meet its liabilities, the Courts have held that creditors were not obliged to pursue their remedy against the individual stockholders, but might follow the property. But this comes back to the proposition that in every such case there was no *bona fide* sale or purchase but a fraudulent transfer to distribute corporate assets among shareholders in fraud of creditors.

It clearly appears in the instant case that payment in stock, instead of cash, for the property bought by petitioner did not in any way affect the rights or even the convenience of Virginia creditors.

Neither the buyer nor the seller was a Virginia cor-

poration and the contract was made in New York. If the petitioner paid for the property bought in cash, there would have been no more assets in Virginia for the convenience of Virginia creditors than there were under the actual conditions of the sale, since the Southern Express Company, having withdrawn its business from Virginia would hardly be expected to send the cash realized to that state for deposit, to its own inconvenience.

The Virginia Court, therefore, did not have before it in the record, nor were there in existence, the facts necessary to support its decision, and it is the duty of this Court to review and correct the error.

Postal Tel. Cable Co. v. *Newport,* 247 U. S. 473;
So. Pacific v. *Schuyler,* 227 U. S. 611;
N. C. Ry. Co. v. *Zachary,* 232 U. S. 248;
Carlson v. *Curtis,* 234 U. S. 103;
Norfolk & W. R. Co. v. *Conley,* 236 U. S. 605;
Interstate A. Co. v. *Albert,* 239 U. S. 560.

POINT II.

The Special Court of Appeals of Virginia attempts to establish by judicial decision a rule of law which would be unconstitutional if created by statute; but, even if the State Legislature could properly enact such a statute, the decision of the State Court is not based upon principles of common law but is an attempt at judicial legislation under the police power of the State which cannot be applied retroactively to affect vested rights.

It is difficult to determine from the decision of the Special Court of Appeals of Virginia the exact ground

upon which its decision is based. The authorities quoted by the Court for its decision deal with consolidated corporations only; while in the instant case the record is clear and positive that there was no consolidation, nor any expressed or implied agreement to assume the debts and liabilities of the selling corporation. It would seem that the Court of Appeals of Virginia assumes that in every case where property is purchased and paid for in stock of the purchasing corporation this *ipso facto* effects a consolidation or merger to such an extent as to make the purchasing corporation liable for the debts of the selling corporation, even though the selling corporation makes no distribution of the stock received for the property and has ample assets independent of such stock to meet the claims of its creditors.

One thing clearly appears from the decision of the Court and its citations of authorities which may be summed up in brief as follows: that the property located in Virginia of a solvent foreign corporation constitutes a trust fund for the benefit of Virginia creditors.

There is neither constitutional nor statutory provision in Virginia imposing upon a person or corporation buying all or a part of the property of a foreign corporation doing business in Virginia liability for the debts of the selling corporation, even though the purchase price may be paid in stock of the purchasing corporation. The Legislature of the State of Virginia in the exercise of the police power of the State might enact a statute for the protection of its own citizens as creditors of a foreign corporation coming into the State to do business, provided such enactments were reasonably necessary for the object to be attained and did not invade rights under the Federal Constitution. It seems clear, however, under the decision of this Court in *Blake* v. *McClung*, 172 U. S. 239, that the State of Virginia could not without violating

rights safe-guarded under the Constitution of the United States, even by statute, subject the assets of a foreign corporation doing business within the state to the claims *of creditors within the state* in preference to the right in equity of citizens residing in other states to participate upon terms equivalent with the citizens of Virginia in the distribution of assets of an insolvent corporation; and, from the decision in that case, it would seem even more doubtful that the Legislature of Virginia could impose the harsh and unreasonable rule that the property of any foreign corporation coming into Virginia to do business must be impressed with a trust in favor of Virginia creditors, although the corporation itself was solvent and, being engaged in interstate commerce, could not be excluded from doing business within the State. As said by the Court in *Blake* v. *McClung, supra*:

> "We hold such discrimination against citizens of other states to be repugnant to the second section of the fourth article of the Constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for the purpose of business. Such a power cannot be exercised with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land."

The petitioner in the instant case, a corporation engaged in interstate commerce, cannot be excluded from the State of Virginia by any statute of the Legislature, nor can the State require from it in advance any agreement expressed or implied as a condition of doing business. *Crutcher* v. *Kentucky*, 141 U. S. 474.

It seems doubtful, therefore, if the State of Virginia could, without a regulation of interstate commerce obnoxious to the Federal Constitution impose upon the

petitioner any burdens with respect to the use of its property within the State of Virginia, even by statutes passed for future operations.

Any doubt in the matter, however, disappears when we come to the question of the power of the Legislature to pass a statute affecting vested rights and acting upon transfers of property acquired prior to such legislation.

There can be no question that a statute creating a lien or obligation upon property already acquired before the enactment of the statute to pay the debts or liabilities of the vendor in a sale consummated four years previous would be invalid, not only as impairing the obligation of a contract, but also as a deprivation of property without due process of law.

The Special Court of Appeals of Virginia, however, in the instant case undertakes to do by judicial decision what would be clearly unconstitutional if enacted as a statute by the Legislature of Virginia. The transaction entered into, by which the property was purchased by the petitioner, was completed on July 1, 1918, and there was not prior to that date any decision by the state courts of Virginia imposing on the petitioner a liability which did not attach by common law. So far as the decisions of the State of Virginia and the ruling decisions of other states and of this Court are concerned, the petitioner took the property of the Southern Express Company free and clear of any lien of creditors and paid for the same upon the basis of its securities issued under the approval of an officer of the United States Government. There was no fraud, actual or constructive, and no suspicion of fraud attending the transaction which, by reason of its importance, received the widest publicity. Long after the petitioner had closed up all of its transactions with the Southern Express Company and paid over to it all amounts due

the Southern which came into its hands through the closing up of unfinished contracts, arises this claim on behalf of plaintiff who for two years held his judgment against the Southern Express Company without taking out an execution on the same or apparently endeavoring to collect it in any state in which the Southern Express Company had property.

The highest court of Virginia upon the record already pointed out, holds the petitioner liable for the debts and liabilities of the Southern Express Company in Virginia; and, in so doing, enacts a new rule of law which would be unconstitutional if applied by statute. As said by this Court in *Blake* v. *McClung, supra*:

> "It is an established rule of equity that when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors (*Graham* v. *Railroad Co.*, 102 U. S. 148, 161)—*not simply of stockholders and creditors residing in a particular state, but all stockholders and creditors of whatever state they may be citizens.* (Italics ours.) In *Wabash, St. Louis etc. Railway Co.* v. *Ham*, 114 U. S. 587, 594, it was said that the property of a corporation was a trust fund for the payment of its debts, in the sense that when the corporation was lawfully dissolved and all its business wound up, or when it was insolvent, all its creditors were entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. In *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 385, it was observed that a private corporation, when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exists in favor of the creditors of a partnership after becoming in-

> solvent, and that in such a case a lien and trust will be enforced by a court of equity in favor of creditors. These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that State, without making any distinction *between them.* Yet the courts of that State are forbidden, by the statute in question, to recognize the right in equity of citizens residing in other States to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent corporation lawfully doing business in that State."

If the rule announced by the Virginia Court of Appeals would have been unconstitutional as a statute, it seems clear that this Court can review it if its effect is to deny petitioner the equal protection of the law and deprive it of property without due process of law. *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 529:

> "It seems to us clear that the state might, without conflict with the 14th Amendment, enact through its legislative department a statute precisely to the same effect as the rule of law and public policy declared by its court of last resort. And, for the purposes of our jurisdiction, it makes no difference, under that Amendment, through what department the state has acted. The decision is as valid as a statute would be."

The amendment of February 17, 1922, to Section 237 of the Judicial Code, clearly indicates that a change in a rule of law established in a state by judicial decision may violate rights under the Federal Constitution:

> "In any suit involving validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state would be repugnant to the Constitution of the United States, the Supreme Court shall upon writ of error remand, reverse or affirm

> the judgment of the State Court if such claim is set up in the case before the final judgment is entered by the State Court and the decision is against the claim so made."

This amendment clearly recognizes that rights may be vested under a rule of law laid down by the highest court of the state and that a change in such rule of law made by the highest court of the state may be repugnant to the Federal Constitution as impairing these vested rights. While this case does not come before this Court upon a writ of error, the question of the validity of a contract, *i. e.*, the contract of purchase by the petitioner and sale by the Southern Express Company of its property is involved and is subject to review by this Court upon writ of certiorari.

The decision of the State Court below, not being based upon any statutes or constitutional provision of the State of Virginia presumably depends for support upon the principles of the common law. There is, however, in the present case no peculiar reason for this Court to defer to the decision of the Virginia Court as to common law. It is the duty of Federal Courts to determine for themselves questions of commercial law, general jurisprudence and of rights under the Constitution of the United States.

> *Oates* v. *First National Bank,* 100 U. S. 246;
> *Swift* v. *Tyson,* 16 Peters. 1;
> *Guernsey* v. *Imperial Bank,* 188 Fed. 300;
> *First National Bank* v. *Liewer,* 187 Fed. 16.

Even if the decision of the Virginia Court were to be held to have created a fixed rule of property in the State of Virginia, the decision was made after the rights of the parties had accrued and was not controlling on the Federal Courts. It is their duty to exercise

their independent judgment as to what the common law is.

Great Southern Fireproof Hotel Co. v. *Jones*, 193 U. S. 532;
Shaw v. *C. C. C. & St. L. R. Co.*, 173 Fed. 750;
Brewer-Elliott Oil & Gas Co. v. *U. S.*, 270 Fed. 104.

To make the decisions of the State Court obligatory on the Federal Court, the right must have accrued after the rule had been established.

Murray v. *Wilson Distilling Co.*, 213 U. S. 157;
Great Southern Fireproof Hotel Co. v. *Jones*, *supra.*

The rule previously established in Virginia as in other states where a corporation transferred all of its property to another corporation in exchange for stock of the new corporation and, after such transfer, the new corporation was controlled by the persons who had controlled the old corporation or the stock received or distributed among the stockholders of the old corporation, was that the new corporation was liable for the debts of the old, at least to the extent of the property acquired. However, the rule established in the present case extends the imposition of liability to an extent never dreamed of previously. In this case, the vendor was a solvent corporation, the property transferred in Virginia was a very small part of the entire property and the selling corporation retained more than $1,000,000 in solid assets, amply sufficient to pay all of its debts and liabilities. There was no identity of control between the two corporations and the total stock received in Virginia and elsewhere by the selling corporation was

approximately only about 5% of the stock of the purchasing corporation. There was no dissolution of the corporation and no distribution of stock to its stockholders of any kind. The old rule was applied because of identity of control, or the fact of dissolution of the old corporation or the distribution of the proceeds. The new rule holds that it is immaterial whether or not there is identity of control or the vendor remains in business or whether or not the proceeds of the sale are distributed among shareholders of the vendor. The only material thing, in view of the new rule, is that it is stock of the new corporation which is issued in exchange for the property transferred. The general rule of the common law is that a corporation which purchased all the property of another corporation is not *ipso facto* liable for the debts of the latter.

Postal Telegraph Co. v. *Newport*, 247 U. S. 464;
Gray v. *National Steamship Co.*, 115 U. S. 116;
Fogg v. *Blair*, 133 U. S. 534;
Koch v. *Speedwell*, 140 Pac. 598 (Cal.);
Buckler v. *U. S. etc. Co.*, 112 Atlantic 632 (Pa.);
Hageman v. *Southern Ry. Co.*, 202 Mo. 249;
McAlister v. *American Ry. Ex. Co.*, 103 S. E. 129 (N. C.);
Swing v. *Empire Lumber Co.*, 105 Minn. 356;
Cook on Corporations, 8th Edition, Vol. 3, Sec. 673, and cases cited.

The decision of the Virginia Court was not necessary to preserve the rights of creditors of the Southern Express Company who had exhausted every other remedy in an effort to collect, *but was imposed merely for the*

convenience of Virginia creditors. The only right which was lost to the Virginia creditors by the transfer was that of having their claims adjudicated by Virginia courts, but the presumption of course attaches that a Virginia court would deal as fairly and impartially with a controversy arising between its own citizens and a foreign corporation as the Courts of another state. Hence the right so lost could not, without discourtesy to the Virginia Courts, be termed an advantage, but merely a convenience.

So far as the absolute rights of creditors are concerned in the instant case, they would not be impaired to any greater extent had the petitioner bought the property of the Southern Express Company for cash and paid over the amount where the transaction of sale of all the property was completed, *i. e.* at New York. They might have regarded it as inconvenient to bring their suits in New York where the property of the Southern Express Company was located, but if the convenience of litigants is to be made the determining factor, then it might be argued with equal force that if a corporation sold its property in a single county or municipality in any state, the purchaser would take the property subject to an implied obligation to meet the debts and liabilities of the selling corporation arising within that particular county or municipality. In the instant case, however, the Court has not even the justification of convenience. No creditor in Virginia or elsewhere of the Southern Express Company was prejudiced by the transfer of the property to the petitioner, and the Southern Express Company was in a better position to respond to the demand of its creditors than it was before the sale. The contract between the petitioner and the Southern Express Company for the purchase of its property was valid under the common law of Virginia and elsewhere at the time it was made and

nothing in the conduct of the petitioner has in any way contributed to change it. The petitioner became the owner of the property free and clear of all liens in July, 1918. The effect of the rule created by the Virginia Court is to make a new contract between the American Railway Express Company and the Southern Express Company under which the petitioner is required to pay in addition to the consideration of the original contract the indefinite and indefinable sum of any claim of Virginia creditors which may be brought against it. As already pointed out an enactment by statute of the Virginia Legislature to the effect of this decision would be clearly unconstitutional, and it is impossible for us to see any distinction between judicial legislation by the Court under the police power and the enactment by the State Legislature under the same power. The law of the land established the ownership of the property in the petitioner. The rule established by the Virginia Court takes it away four years after the property was acquired. If this be not lack of due process of law and deprivation of the equal protection of the law, it is difficult to imagine a situation to which these terms would be applicable.

POINT III.

The judgment of the Circuit Court of the City of Norfolk against the Southern Express Company on which the judgment in this case is based is null and void because the Court did not have jurisdiction of the Southern Express Company and hence to require the petitioner to satisfy a judgment based upon such claim would be to deprive it of its property without due process of law.

The petitioner is held by the Virginia courts for an alleged liability of the Southern Express Company upon the theory that a purchase of a part of the property of the Southern Express Company rendered petitioner liable for its debts and liabilities in Virginia.

The basis of the action against the petitioner is a judgment entered by default in May, 1920, against the Southern Express Company, a foreign corporation, which admittedly withdrew from the State of Virginia on July 1, 1918, and has never been in business in the state since that time. The suit on which this judgment was entered was brought in September, 1919, and by order of the Court summons was served on the Chairman of the Corporation Commission of Virginia. The record shows that the Southern Express Company had no agent authorized to accept service within the state and that it appeared specially and moved to quash upon the ground that it was not doing business within the state and that no proper service had been made upon it. The petitioner was not a party to this action and it will be seen that the suit was brought more than a year and judgment rendered more than two years *after the purchase by the petitioner of part of the Southern Express Company's property.* The judgment in question

remained dormant for more than two years, no execution being taken out on same, and in July, 1922, this action was brought against the petitioner, the declaration reciting the judgment recovered against the Southern Express Company, the purchase of all of the property of the Southern Express Company in Virginia by the petitioner and *the distribution of the assets of the Southern Express Company among its stockholders to the exclusion and prejudice of its creditors.*

(a) *The judgment against the Southern Express Company is null and void.*

As already pointed out, the Southern Express Company, a foreign transportation corporation, doing business within Virginia up to June 30, 1918, withdrew from the state and left in it no authorized agent for the service of process. An attempt, therefore, of the Virginia courts to give effect to process served upon one of the state officials conferred no jurisdiction upon the court to enter a judgment *in personam* against the Southern Express Company. As said by this Court in *Philadelphia & Reading Co.* v. *McKibbin,* 243 U. S. 264:

> "A foreign corporation is amenable to process to enforce a personal liability in the absence of consent only if it is doing business within the state in such a manner and to such an extent as to warrant the inference that it is present there, and even if it is doing business within the state, the process will be valid only if served upon some authorized agent. *St. Louis S. W. Ry.* v. *Alexander,* 227 U. S. 226. Whether the corporation was doing business within the state and whether the person served was an authorized agent are questions vital to the jurisdiction of this court. A decision of the lower court if duly challenged is subject to review in this court, and the review extends through findings of fact as well as conclusions of law."

The evidence in the case is without conflict. It is conceded by stipulation that the Southern Express Company was not doing business in the state after July 1, 1918. The return of the sheriff in the suit shows that no authorized agent of the company was served. Under the decisions of this Court, therefore, the judgment of the Circuit Court of the City of Norfolk was null and void, because the Southern Express Company did not have its day in court.

The Special Court of Appeals of Virginia apparently holds that the judgment against the Southern Express Company was merely voidable and not absolutely void, saying:

> "The Circuit Court of the City of Norfolk, a court of general jurisdiction, having jurisdiction of the subject matter and the parties upon the service of process adjudged by it to be valid and not void upon its face, is conclusive in Virginia upon other courts and not open to collateral attack. * * * The Southern Express Company has not been denied due process of law and the judgment against it was properly admitted in evidence."

The Virginia courts appear to have been misled by failing to observe the distinction between void judgments and those which are merely voidable, and in this error not only are out of harmony with the uniform decisions of this Court and other states, but also with the decisions of their own courts. In *Gray* v. *Stevart,* 74 Virginia 351, the Court said:

> "The leading distinction is between judgments and decrees merely void and such as are voidable only. The former are binding nowhere; the latter everywhere until reversed by a superior authority." (Citing *Harris* v. *Hartman,* 14 How. 334.)

As said by this Court in an opinion by Mr. Justice White in *Haddock* v. *Haddock*, 201 U. S. 562:

> "Where a personal judgment has been rendered in the courts of a state against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. *Indeed a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the state where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the state where rendered, the enforcement of such a judgment.*" (Italics ours.)

Again, as said in *McDonald* v. *Maybee*, 243 U. S. 90:

> "An ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the state as outside of it."

The finding of the Circuit Court of the City of Norfolk that it had jurisdiction of the case could not confer jurisdiction on the Court unless it affirmatively appeared in the record that the defendant Southern Express Company, a foreign corporation, was doing business within the State. *Knapp* v. *Wallace*, 50 Oregon 348.

The record in the instant case abundantly shows that the Southern Express Company was not within the jurisdiction of the Court. The declaration, while reciting that the Southern Express Company is a foreign corporation authorized to do business in Virginia, does not recite that the Southern Express Company was doing business in Virginia at the time the action was brought. The return of the sheriff recited that the law-

fully appointed agent of the company for the service of legal process was no longer a resident of Virginia and was absent from the state and that no person residing in the state had been appointed in his place and that the summons was executed by delivering a copy to the Chairman of the State Corporation Commission.

The record of a special appearance and motion to quash on behalf of the Southern Express Company recites that at the time of and before the service of process it had no agent in the state on whom the said notice could be lawfully served and at the time of the aforesaid attempted service it was not carrying on its business in Virginia and did not accept or waive service of said writ.

In the instant case, counsel for the plaintiff stipulated that after July 1, 1918, the Southern Express Company no longer operated a transportation company in Virginia. It clearly appears, therefore, that the Circuit Court of the City of Norfolk, in adjudging that it had jurisdiction of the Southern Express Company in an action in *personam* relied solely upon the jurisdiction obtained by service on the Chairman of the Corporation Commission, presumably under the Virginia statute affecting transportation corporations who have failed to designate an agent for service of process. But the statute in question must be construed as affecting only such corporations as are still doing business within the state since to give it a construction that would enable service to be made upon corporations not doing business within the state would be to extend the laws of Virginia beyond its borders. As said by this Court in *St. Clair v. Cox*, 106 U. S. 350, construing a similar state law:

> "We do not understand the law as authorizing the service of a copy of the writ as a sum-

> mons upon an agent of a foreign corporation, unless the corporation be engaged in business in the state and the agent appointed to act there. We so construe the words 'agent of such corporation within the state.'"

Again, at page 359 in the same case, the Court says:

> "It is sufficient to observe that we are of the opinion that when service is made within the state upon an agent of a foreign corporation, it is essential in order for the jurisdiction of the court to render a personal judgment it should appear somewhere in the record, either in the application for the writ or accompanying its service or in the pleadings or the findings of the court that the corporation was engaged in business in the state."

It seems clear, therefore, that under the decisions of this Court, the statute of Virginia prescribing substituted service upon the Chairman of the Corporation Commission must be held to apply only to those foreign corporations which are doing business within the state at the time of the attempted service; and that any construction by the courts of Virginia that the statute contemplated service upon the Chairman of the Corporation Commission in the case of a foreign corporation not doing business within the state would make the statute itself obnoxious to the Federal Constitution as lacking in due process of law. Therefore, the judgment of the Circuit Court of the City of Norfolk against the Southern Express Company is void because it clearly appears the Court did not have jurisdiction to enter a judgment *in personam* against that company.

(b) *For the Virginia courts to require the petitioner to satisfy a judgment based upon a nullity would be to deprive the petitioner of its property without due process of law.*

Even if petitioner had specifically assumed the debts and liabilities of the Southern Express Company a judgment against petitioner upon a liability of the Southern Express Company could only be rendered after a hearing following due process of law and proof of fact establishing such liability. If petitioner were in fact or in law liable for the liabilities of the Southern Express Company, the law of the land requires that such liabilities be established by proof of facts in an action in which petitioner is a party or in which it might plead and prove any defenses which could be pleaded or proved by the Southern Express Company. Under such conditions the petitioner might become liable for a judgment against the Southern Express Company secured *prior* to the purchase of the property and of which the petitioner therefore would be deemed to have had notice when it purchased the property as a possible lien against the same, or if the petitioner had been made a party to the action against the Southern Express Company, and thus have had notice of the liability claimed against, it and the opportunity to defend in the action upon which the void judgment was rendered. The petitioner was in Virginia doing business throughout the state and easily accessible for service upon it in such suit while the Southern Express Company was beyond the jurisdiction of the Virginia courts. Notwithstanding these facts more than four years elapsed before the petitioner in the suit in the instant case was served with any notice that the creditors of the Southern Express Company asserted a lien on the property pur-

chased from that company by the petitioner. Indulging the respondent to the greatest extent possible, therefore, it would seem that neither in law nor in equity could it assert successfully a claim against petitioner under such a state of facts.

The judgment of the Circuit Court of the City of Norfolk against the Southern Express Company being a nullity it necessarily follows that a judgment against the petitioner based upon a void judgment must also be a nullity and a denial of due process of law. The petitioner under the law of the land is entitled to notice and a full hearing and to have judgment rendered against it only upon the proof of facts which rendered it liable. The admission, therefore, by the Circuit Court of the City of Norfolk of the record and judgment in a prior adjudication to which the petitioner was not a party and of which it can neither be charged with constructive notice or actual notice was a denial of due process of law within the meaning of the federal constitution.

But the record in the instant case shows clearly that the petitioner was not liable for the debts of the Southern Express Company and that the conditions attending the purchase by it of the property of the Southern Express Company did not impress that property with a lien or trust in favor of creditors. The Southern Express Company was not insolvent. Upon the contrary, it had ample property for the satisfaction of every legal liability against it. As said in *McDonald* v. *Williams,* 174 U. S. 397:

> "When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its

> property is absolute so long as it does not violate its charter or the law applicable to such corporation."

The petitioner was a *bona fide* purchaser for value under circumstances which exclude any suggestion of fraud either actual or constructive, and was entitled to purchase the property it obtained from the Southern Express Company without regard to the latter's creditors. As said in *Hollins* v. *Briarfield Coal & Iron Co.*, 150 U. S. 371:

> "A party may deal with a corporation in respect to its property in the same manner as with an individual owner and with no greater danger of being held to have received into his possession property burdened with a trust or lien."

The judgment against the Southern Express Company being *in personam* and the Court having no jurisdiction of the defendant, the entire proceeding was a nullity, and therefore to take the property of the petitioner to satisfy a void judgment against the Southern Express Company is lacking in due process of law under the Federal Constitution.

POINT IV.

Importance of issue.

The issue in this case is of great importance.

(a) *To petitioner.*

To the petitioner since it determines whether or not its executed contracts are valid or whether they may be rewritten by the Courts of every state in the Union so as to impose upon petitioner an additional payment

for the property purchased and paid for seven years ago. Petitioner is unable to conjecture the precise effect of the establishment of the new rule created by the Virginia Courts, since it has no knowledge of the total of the claims that might be asserted against it under such a rule.

(b) *To the public.*

It is of great public interest, because of the principles of law involved. If the decision of the Virginia Courts be sustained, then the title to property bought and sold by foreign corporations ceases to be absolute and becomes subject to liens not heretofore existing.

Such a rule demands a readjustment of all corporate enterprises, since the new liability so imposed upon the corporation, affected the desirability of its stock and therefore impairs its ability to attract capital for its operations. It lessens the possibility of sale of assets by solvent corporations, since prospective purchasers may be unwilling to meet the hazards of an extension of such principles.

Conflict of Judicial Decision.

It is highly important that the existing conflict of judicial decision upon the questions involved be determined.

On the one side are decisions of the highest courts of Virginia, Kentucky, South Carolina and Iowa, and Court of Appeals of Texas (now pending in the Supreme Court of Texas).

On the other side are decisions of the highest court of North Carolina, of Ohio, and the United States District Court of Virginia.

POINT V.

A writ of certiorari should be issued to the Special Court of Appeals of Virginia directing that the record of this case be sent up to this Court for review and for such action as it may deem proper.

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KENNETH E. STOCKTON,
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APPENDIX.

Opinion.

SPECIAL COURT OF APPEALS.

CIRCUIT COURT OF CITY OF NORFOLK.

AMERICAN RAILWAY EXPRESS COMPANY, A CORPORATION,

—v—

F. S. ROYSTER GUANO COMPANY, A CORPORATION,

Richmond, Va., February 26, 1925.

Opinion states the facts.

CHRISTIAN, *J.*:

In 1917, the Southern Express Company, that was then doing business in Virginia and other Southern States, had delivered to it, at Richmond, Virginia, on the 27th day of September, 1917, two packages of tax tags, valued at $450, consigned to the F. S. Royster Guano Company, at Norfolk, Virginia. These packages were lost in transit, and the consignee filed claim with the Express Company before July 1, 1918, for its damage by reason of the loss. Prior to this latter date, the Director General of Railroads required all the express companies doing business over the railroads in the United States to merge and consolidate into one express company. This was accomplished by the independent express companies securing a charter from the State of Delaware, under the name of The American Railway Express Company, to which they conveyed and transferred all of their tangible assets used in the express business,

though each of the companies retained their corporate existence, officers and offices. In payment for the assets turned over to the American Railway Express Company according to the value thereof, it issued to each constituent company so much of its capital stock at par as represented its input. The Southern Express Company received in this distribution of stock $1,750,000, which it still holds and owns, with other available assets of approximately $1,000,000. While doing business in Virginia, the Southern Express Company, appointed John D. Hockaday its agent, upon whom process against it might be served. Immediately after the consolidation took place, Hockaday removed from the State and there was no statutory agent left in the State upon whom process could be served.

The F. S. Royster Guano Company brought in the Circuit Court of the City of Norfolk its action of trespass on the case for $600 damages, for the loss above mentioned, against the Southern Express Company, and matured the same on process returnable on the 1st December rules, 1919, which process was served on W. F. Rhea, Chairman of the Corporation Commission, and by immediately transmitting a copy thereof by mail to said company, pursuant to Subsection 3 of Section 1294 of the Code of Virginia, 1904.

The Southern Express Company appeared specially in the case and moved the Court to quash the writ and return because it had ceased to do business in the State at the time of the issuance of the writ, nor did it have any statutory attorney therein, the former one having removed therefrom for more than a year. The Court, upon consideration, overruled the motion to quash, and the defendant made no further appearance nor appealed therefrom.

The Circuit Court of the City of Norfolk, at its May, 1920, term, proceeded to hear and determine the case

without the intervention of a jury, and the plaintiff being fully heard, the Court entered judgment against the Southern Express Company for the plaintiff for the sum of four hundred and fifty dollars, with interest from the 15th day of May, 1920, till paid. No execution was issued upon this judgment.

At the first July rules, 1922, in the Circuit Court of the City of Norfolk, the plaintiff filed a declaration in debt against the American Railway Express Company upon its judgment against the Southern Express Company, alleging liability upon the defendant by reason of the fact that it had taken over the assets of the Southern Express Company, and that such assets had been distributed to the exclusion and prejudice of its creditors.

The case coming on to be heard by the Court without the intervention of a jury, on the 13th day of April, 1923, judgment was entered for the plaintiff against the defendant for four hundred and sixty-one dollars and forty cents ($461.40), with legal interest on $450 from the 15th day of May, 1920, till paid and its costs. Motion to set aside the judgment was made and overruled, to which the defendant excepted. The case is before this Court on exceptions, for error in overruling the defendant's motion for a new trial, and errors committed in the course of the trial. For convenience the parties will be spoken of as plaintiff and defendant, as they were in the trial Court.

The first error for consideration is the action of the Court in striking out the defendant's plea of the Statute of Limitations. No execution was issued upon the judgment against the Southern Express Company and Section 6477 Code of Virginia provides:

> "On a judgment, execution may be issued within a year and a *scire facias* or *action* may be brought within ten years after the date of the judgment * * *."

The contention of the defendant was that "a *scire facias*" or *action* was the same or identical proceedings in law. This was not the correct construction of the Statute. The proceeding by *scire facias* in this State is not a new suit, but a continuation of the old suit. Its object is to obtain execution of a judgment which has become dormant by the lapse of time, and it is essential that the writ, which serves the double purpose of a writ and a declaration, shall state all the facts necessary to authorize the relief sought. It should follow the judgment to be revived as to the amount, date and parties. *White* v. *Palmer*, 110 Va. 490.

> "At the common law, an action of debt will lie on a judgment as soon as it is recovered, and *without regard to the plaintiff's right to take out execution;* for the remedy by execution is cumulative merely, and the statutes giving this remedy do not impair the common law right of action on the judgment as a debt of record." Black, Judgments, Sec. 958. *Hickman* v. *Macon Co.*, 42 Fed. 759; *Wilson* v. *Hatfield*, 121 Mass. 551; *Stewart* v. *Peterson*, 63 Pa. St. 230; *Kingsland* v. *Forest*, 18 Ala. 519, 52 Am. Dec. 232.

The Statute of Virginia recognizes the action of debt as at common law, and fixes the limitation at ten years. The plea of the Statute of Limitations was properly stricken out.

The next error alleged is that the Circuit Court of the city of Norfolk was without jurisdiction of the Southern Express Company, and that the judgment of the plaintiff was void. This matter was submitted to the Court, in that action, upon a motion to quash the return because the service was illegal, and was decided adversely to the company; and having appeared specially, no further appearance was made in the case nor effort to have

same reviewed. It is well settled "that defects or irregularities in the process or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely nugatory, in which case the judgment fails for want of jurisdiction. It follows that a judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice although such service of notice may be materially defective." Black, Judgments, Sec. 263. *Murray* v. *Weigle,* 118 Pa. St. 159, 11 Am. Rep. 781; *Allison* v. *Rankin,* 7 Serg. & R. 269.

It need scarcely be added that if the judgment sued on be a foreign judgment, or one rendered in a sister State, the question of jurisdiction is always open to inquiry. Black, Judgments, Secs. 818, 835, 894-915. The cases cited and discussed before the Court are of this latter character and are therefore not authority upon the question of jurisdiction before this Court.

The Circuit Court of the city of Norfolk, a court of general jurisdiction, having jurisdiction of the subject matter and parties, upon the service of process adjudged by it to be valid and not void upon its face, is conclusive in Virginia upon other courts, and not open to collateral attack. This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. "It is one which has been adopted in the interest of the peace of society and the permanent security of title. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would

be no end to litigation and no fixed established rights." *Lancaster* v. *Wilson*, 27 Gratt. 624, 629. *Vorhees* v. *The Bank of the United States*, 10 Peters (U. S.), 449, 474; *Wilcher* v. *Robertson*, 78 Va. 602.

The Southern Express Company had not been denied "due process" of law, and the judgment against it was properly admitted in evidence.

The other assignments of error are based upon the claim of the defendant that the evidence does not prove that the Southern Express Company was merged and consolidated into the American Railway Express Company, and that the Southern Express Company still maintains its corporate existence, and that such merger was by compulsion of the Director General of Railroads.

It is uncontroverted that the Southern Express Company turned over its business and property used in its business, along with another express company, for its proportionate share of the stock of the defendant, and ceased to do an express business, nor were any assets left in the State of Virginia to pay the obligations of the Southern Express Company.

The case of *American Railway Express Company* v. *Downing*, 132 Va. 139, in an able and exhaustive opinion by Judge Sims, settled the law in Virginia in reference to the merger of the Southern Express Company and others in to the defendant company as a consolidated corporation, liable for the debts of the constituent companies. The following is the law on the subject as therein stated: "When two or more corporations are consolidated into a new corporation with a new name, and the constituent corporations go out of existence, if no arrangements are made respecting their property and liabilities, the consolidated corporation will be answerable for their liabilities, at least to the extent of the property acquired from the constituent corporation

whose liability is sought to be enforced against the consolidated corporation." As to the constituent corporation *going out of existence,* it is held: "It is not essential to the liability of the corporation for the debts or claims against its constituent corporations that the constituent companies cease to exist *de jure* upon the organization of the new corporation. The going out of existence of the constituent companies is the cessation of all actual transactions of business as a going concern. Its continued existence *de jure* for the purpose of winding up its affairs is immaterial." *Am. Ry. Ex. Co.* v. *Downing, supra.*

The principles upon which the cases are based, are that the assets of the constituent corporations are a trust fund for payment of their debts, and when the consolidated corporation takes over the assets in exchange for stocks and bonds, there is an implied contract in law to pay such debts out of the assets.

The judgment of the circuit court is plainly right, and will be affirmed.

Affirmed.

A copy, Teste:

(Name illegible)
C. C.

No. 477

IN THE

Supreme Court of the United States,

OCTOBER TERM—1925.

F. S. ROYSTER GUANO COMPANY,
Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,
Defendant-Appellant.

BRIEF OF APPELLANT.

CHARLES W. STOCKTON,
Attorney for Defendant-Appellant.

BRANCH P. KERFOOT,
Of Counsel.

Court Press, N. Y. C. Bowling Green, 2820

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IN THE

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OCTOBER TERM—1925.

F. S. ROYSTER GUANO COMPANY,
Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,
Defendant-Appellant.

BRIEF OF APPELLANT.

Statement.

This is a review by certiorari of a judgment of the Special Court of Appeals of Virginia (the highest court of that state) affirming the judgment of the Circuit Court of the City of Norfolk in favor of F. S. Royster Guano Co., plaintiff-respondent, in an action brought against appellant, the American Railway Express Company.

This action is brought to hold the appellant liable for the amount of a judgment theretofore rendered against the Southern Express Company, appellant having acquired the property of the Southern Express Company theretofore used in its domestic express transportation business. The existence of the appellant and its exchange of its stock for the Southern Express Company's property arose from the action of the Executive branch of the United States Government during a state of war

in furtherance of the belief that complete unification of inland transportation was necessary to the successful prosecution of the war (R. 20).

On December 28, 1917, the President of the United States acting under the power conferred on him by vote of Congress, took possession and assumed control of practically all the railroad lines in the United States and appointed as his agent in charge thereof Wm. G. McAdoo, as Director General of Railroads.

The Southern Express Company and three other companies had been operating over these lines under long term contracts and immediately made application to the Director General of Railroads to ascertain whether they had been taken over with the railroad lines. The Director General finally held that he had not taken over the express companies and declared he would not do so. He indicated that he would be willing to deal with a single company which would operate all over the United States. The Southern Express Company preferred to operate for itself, or to have the company taken over under Federal control, but being confronted with such an emergency, and unable to continue its operations, transferred its property and $300,000 in cash to the American Railway Express Company in exchange for $1,750,000 par value of stock of that company (R. 22), but the transfer was only made in order to secure as nearly as possible the value of the physical property transferred (R. 21).

On July 1, 1918, the appellant began doing an express business in Virginia and elsewhere and the Southern Express Company withdrew from the State of Virginia and ceased doing business within that state (R. 33).

On September 15, 1919, the F. S. Royster Guano Company brought suit in the Circuit Court of the City of Norfolk against the Southern Express Company and the summons in such proceeding was served upon Hon. W. F. Rhea, Chairman of the Corporation Commission of Virginia (R. 34).

The Southern Express Company appeared specially and moved to quash on the ground that it was not carrying on its business in Virginia and had no agent in the State upon whom service could be made which motion was denied and later judgment was entered against the Southern Express Company by default which judgment lay dormant for about two years, no execution being taken out on same; but in July, 1922, the plaintiff in the before mentioned case filed a declaration in *assumpsit* against the appellant American Railway Express Company.

This declaration (R. 13) set forth that F. S. Royster Guano Company had recovered a judgment against the Southern Express Company which remained in full force and effect and unpaid; that prior to such judgment the American Railway Express Company took over from the Southern Express Company all the property theretofore belonging to it then owned and used by the Southern Express Company in its business throughout the United States, including all its property in Virginia, issuing therefor to the said Southern Express Company or to its stockholders stock of the American Railway Express Company by means whereof the assets of the said Southern Express Company have been distributed among its stockholders to the exclusion and prejudice of its creditors.

Upon the trial of the case the only affirmative evi-

dence introduced by the plaintiff was that the American Railway Express Company bought from the Southern Express Company all of the tangible property used by the Southern in its express business and paid for the same with capital stock at par (R. 17-23).

The evidence introduced by the plaintiff also showed that no agreement had been entered into at any time between the American Railway Express Company and the Southern Express Company by which it was to carry on an express transportation business theretofore transacted by the Southern; that the appellant did not take over the business of the Southern Express Company on the 1st of July or at any time (R. 22).

The appellant affirmatively showed by undisputed testimony that the Southern Express Company, exclusive of stock received from the appellant, retained real estate and treasury assets of approximately $1,000,000; that the Southern Express Company had not liquidated itself or distributed any of its property or stock of the American Railway Express Company to its stockholders; that there had been no distribution of any kind to the stockholders; that the stock of the American Railway Express Company received by the Southern was still in its possession; that no officer or director of the Southern Express Company was an officer of the appellant; that there was no voting trust or other agreement by which the Southern controlled the policy of the appellant, and that there was, or had been no contract between them under which the Southern agreed to reimburse the appellant; that the Southern Express Company still maintains its corporate existence with offices in New York at which it has officers who are authorized to accept service in suits against it; that

the Southern Express Company has ample assets to meet all remaining outstanding claims against it (R. 21-23).

Upon this record the Circuit Court of the City of Norfolk held the appellant liable for the judgment recovered by the plaintiff-respondent against the Southern Express Company and the Special Court of Appeals affirmed such judgment (R. 30).

The following grounds appear in the opinion of the Special Court of Appeals of Virginia for its decision:

> (1) That the validity of the judgment of the Circuit Court of the City of Norfolk rendered by default against the Southern Express Company, a foreign corporation which had withdrawn from the State of Virginia and upon which service of process had not been made, and to which action appellant was not a party, could not be questioned by appellant in an action to hold it liable on said judgment in any court of Virginia;
>
> (2) That the property of the Southern Express Company within the State of Virginia was impressed with a trust for the benefit of Virginia creditors;
>
> (3) That the American Railway Express Company was guilty of constructive fraud in the purchase of this property in exchange for its own stock and was not a *bona fide* holder for value so as to cut off rights of general creditors of the Southern Express Company to follow this property for the satisfaction of their claims.

The appellant's contention is that the decision of the State Court deprives it of its property without due pro-

cess of law and denies to it the equal protection of the law in that:

(1) It proceeds upon a principle of law based upon assumptions of fact which are unsupported by the record;

(2) It attempts to do by judicial decision what would be unconstitutional in a statute of similar effect;

(3) The decision is contrary to the established principles of common law and is an attempt at judicial legislation under the police power of the State which cannot be retroactively applied to affect vested rights;

(4) It deprives the appellant of its property without due process of law in that the alleged judgment upon which the instant case is based was null and void in that no service of process was made upon the Southern Express Company;

(5) It deprives the appellant of its property without due process of law in that it admits in evidence the record including the judgment, in a former adjudication and of which it had no notice, of a suit brought after the transfer of the property, to which the appellant was not a party.

POINT I.

The basis of fact upon which the Special Court of Appeals of Virginia rests its decision denying the asserted federal right has no support in the record.

There is no conflict in the testimony offered in this case. The action was brought against the appellant charging that the Southern Express Company had sold its property to the appellant for stock of the appellant issued to it or its stockholders and had distributed its assets among its stockholders to the exclusion and prejudice of its creditors. The proof showed that the stock of the appellant issued to the Southern Express Company was never distributed to its stockholders and that the Southern Express Company had distributed none of its assets to its stockholders in dividends or otherwise. Appellant bought from the Southern Express Company the physical property theretofore used by the Southern in its domestic express business in Virginia and elsewhere and paid for it in its own stock at par. The Court in its decision says:

> "It is uncontroverted that the Southern Express Company turned over its business and property used in its business, along with another express company, for its proportionate share of the stock of the defendant and ceased to do an express business, nor were any assets left in the State of Virginia to pay the obligations of the Southern Express Company."

The proof shows that the Southern Express Company did not sell its business nor did the appellant under-

take to carry on its business in Virginia or elsewhere, and it is clearly established that independent of the stock of appellant received by the Southern Express Company, it had approximately $1,000,000 in assets which were amply sufficient to meet all of its legal liabilities.

The Court held that the law in Virginia in reference to the merger of the Southern Express Company and others into the appellant as a consolidated company liable for the debts of the constituent companies had already been settled by the case of *American Railway Express Company* v. *Downing*, 132 Va. 139, and quotes the following from that case:

> "When two or more corporations are consolidated into a new corporation with a new name and the constituent corporations go out of existence, if no arrangements are made respecting their property and liabilities, the consolidated corporation will be answerable for their liabilities, at least to the extent of the property acquired from the constituent corporation whose liability is sought to be enforced against the consolidated corporation * * *.
>
> It is not essential to the liability of the corporation for the debts and claims against its constituent corporation that the constituent company cease to exist *de jure* upon the organziation of the new corporation. The going out of existence of the constituent company is the cessation of all actual transactions of business as a going concern; its continued existence *de jure* for the purpose of winding up its affairs is immaterial."

The Special Court of Appeals goes on to say:

> "The principles upon which the cases are based are that the assets of the constituent corporations are a trust fund for the payment of their debts, and when the consolidated corporation takes over the assets in exchange for stock and bonds, there is an implied contract in law to pay such debts out of the assets."

It is clear, therefore, from the opinion of the Court that its decision is fundamentally based upon facts which do not appear in the record here. The *Downing* case was one in which the appellant was sued upon a liability of the Adams Express Company, in the record of which no facts as to the relations of the appellant and the Southern Express Company appear, and in which case no federal question was raised. In order for the law applying to the instant case to be settled in Virginia by the *Downing* case, *supra*, it would be necessary for the record in the instant case to show: First, that the Southern Express Company sold its business as well as all of its property to and had merged into or consolidated with the appellant; second, that the Southern Express Company went out of existence, leaving no assets or insufficient assets to pay its debts.

The record in the instant case shows that the Southern Express Company was not merged in or consolidated with the appellant; that it still retains its independent corporate existence with ample assets to meet its liabilities; and has never made any distribution to its stockholders of any kind whatsoever. It seems clear, therefore, that the basis of the Virginia Court's decision has no support in the record.

The principles of law quoted but misapplied by the Virginia Court are of course well established by a long line of fairly uniform and consistent decisions constituting the so-called trust fund theory devised by the Courts to protect the creditors of a corporation against any distribution of assets to stockholders in fraud of creditors; and the principles underlying all of the cases is that where stockholders invest their money in a corporation's shares and substitute a limited liability as stockholders for the full liability of an individual, the capital stock of the corporation becomes a trust fund for the payment of creditors who must be satisfied *before a stockholder can withdraw* any portion of the capital so invested, and the assets so distributed may be followed into the hands of the shareholders or any person other than a *bona fide* purchaser for value.

This general impression, however, that the capital stock of the corporation becomes a trust fund applies *only* where a corporation is insolvent or is in process of dissolution. As said by Mr. Justice Brewer in *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371:

> "While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pomeroy's Equity Jurisprudence, Section 1046, they 'are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor.'
>
> To the same effect are decisions of this court. * * * In other words, and that is the idea which underlies all these expressions in reference

to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as an individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditor, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." *Graham* v. *Railroad Co.*, 102 U. S. 148.

Wabash, St. Louis & Pacific Ry. Co. v. *Ham*, 114 U. S. 587;
Fogg v. *Blair*, 133 U. S. 534.

Again in the same decision, at page 385, the Court says:

"A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity

> in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mis-management in respect thereto; but as between itself and its creditors the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case."

This view has been followed generally. In *Pusey & Jones Co.*, 261 U. S. 491, it is said:

> "But an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied, he may proceed in equity by a creditors' bill."

In *Graham* v. *La Crosse and Milwaukee Railroad Co.*, 102 U. S. 148, it is said:

> "The contention that while an individual has supreme domination over his property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors, is not sound. * * * The corporation is a distinct entity entitled to hold property exactly as an individual can hold it."

In *McDonald* v. *Williams*, 174 U. S. 397, this Court said:

> "When a corporation is solvent the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation."

There are many instances of fraudulent conveyances in which the trust fund doctrine has been referred to as the basis for permitting a creditor to follow property conveyed without consideration in fraud or creditors. As this Court said in *Wabash, St. Louis & Pacific R. R. Co.* v. *Ham*, 114 U. S. 587:

> "The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void."

Under these well established principles of law, for the Virginia Court to hold the appellant liable for debts or liabilities of the Southern Express Company it would be necessary for the record to show (1) that there was

an actual consolidation or merger under which the Southern Express Company became extinguished and the appellant either expressly or by necessary implication of law undertook to pay its debts or liabilities; or, (2) that the Southern Express Company was insolvent and that the transfer of the property to the appellant was a fraudulent conveyance without consideration to defeat the creditors of the Southern Express Company.

The record clearly shows that there was no actual merger or consolidation of the Southern Express Company with the appellant under the usual tests, either by purchase of the stock of the Southern or by purchase of all or substantially all of its property by which the Southern went out of existence and the shareholders became shareholders of the appellant, or that the Southern Express Company at the time of the sale was insolvent. None of these facts appears in the record. Upon the contrary it is clearly shown that the appellant bought a certain part of the property of the Southern and paid for it in its own stock, the property remaining in the Southern's corporate possession being ample to pay all of its liabilities, and none of the property of the Southern being distributed to its shareholders. As to actual fraud, this would seem impossible from the record, nor do we understand that any such charge is made. The Director General of Railways acting under the authority of the President of the United States conceived that it was necessary to unify the express service of the country as the railroads had already been unified to meet the needs of the nation in time of war. He could not permit the unified railroads to be hampered by the several express companies in such an emergency and he required all of

them to cease their operations over the railroads controlled by him and practically constrained them to sell such of their property as was necessary to his purpose to the appellant and a corporation formed under his supervision.

The payment for the property was in stock according to his requirements. He refused to pay cash. If, therefore, actual fraud be charged on this record, it must be the fraud of the Director General since all of the terms of the sale were not only suggested but practically enforced by him. It is, of course, apparent that the Director General could not possibly have benefitted from any actual fraud and, since the appellant and the Southern Express Company both acted under his constraint in the entire transaction, it would seem that actual fraud cannot be deduced from anything in the record.

As to constructive fraud, it would seem necessary, in order to support such a charge, that there must be some circumstances in the case to indicate that the appellant has in its possession assets of the Southern Express Company which it cannot, in equity and good conscience, retain; and these assets must be subject to an equitable claim of the plaintiff and creditors of the Southern Express Company; or, in other words, it must appear that the appellant is not a *bona fide* purchaser for value if the Virginia Courts be held to be right in their judgment. It very clearly appears in the instant case that the Southern Express Company did not by the sale of its property to the appellant place itself in a position to prejudice the interests of its creditors or to substantially impair their remedy against it, since

the Southern Express Company as a corporate entity after the transaction was completed, was in as good, if not a better, position financially to meet its liabilities than it would have been had it refused to sell its property to the appellant: because, as clearly appears from the evidence, it would have been left with its property scattered throughout a number of states in small quantities which could not have been readily disposed of except to someone engaged in the same line of business and, as also shown by the record, it was impossible for any one to engage in the express business at this time without the consent and approval of the Director General who controlled all of the railroad facilities necessary to that business. The Southern Express Company by its acceptance of the Director General's decision sold its property for its approximate cash value and received therefor stock of the appellant which certainly must have represented a greater value in the aggregate than the scattered items of property usable only in the express business had the Southern undertaken to sell its property to others. It cannot, therefore, be said upon the record that the sale of this property to the appellant in any way impaired the rights of creditors of the Southern Express Company.

It would seem that the Virginia Court in the instant case has been misled primarily by the fact that the appellant paid for the property purchased with its own stock instead of cash, and it may readily be that this error has arisen primarily from the fact that in practically all of the cases in which one corporation has been held liable for the debts of another under the trust fund theory, there has been no real change of ownership, but merely a change in the *form* of ownership, the pur-

chasing company paying for the assets of the extinct corporation in its stock which was distributed to the stockholders of the extinct corporation in place of their stock in the extinct company, so that the stockholders of the old corporation became stockholders of the new corporation, and there was no *bona fide* purchase or sale of assets, but simply a change in the name, under the control of the same parties in the new corporation who were in control of the old corporation.

It may be said that the authorities quoted by the Virginia Court rest upon just such cases where the transfer of property was not a *bona fide* sale, and really not any change of ownership, but merely a change in form designed to defeat and defraud creditors, and this has been rightly recognized by the Courts as fraud. It does not, however, as apparently assumed by the Virginia Court, necessarily follow that in every transaction in which stock of the purchasing corporation is issued in payment for the property of the debtor corporation, the transaction is not a *bona fide* purchase and sale or that the rights of the creditors are prejudiced by the transaction.

We submit, in all confidence, that in none of these cases will be found authority for the proposition that the purchasing corporation may be held liable for the debts and liabilities of the debtor corporation where the transaction entered into left the creditors of the debtor corporation in a position to enforce against it the payment of its liabilities and where there were ample assets in its hands to meet such liabilities.

It is true that where stock given for the property has been distributed to the stockholders of the debtor cor-

poration, and no other assets were found to meet its liabilities, the Courts have held that creditors were not obliged to pursue their remedy against the individual stockholders, but might follow the property. But this comes back to the proposition that in every such case there was no *bona fide* sale or purchase but a fraudulent transfer to distribute corporate assets among shareholders in fraud of creditors.

It clearly appears in the instant case that payment in stock, instead of cash, for the property bought by appellant did not in any way affect the rights or even the convenience of Virginia creditors.

Neither the buyer nor the seller was a Virginia corporation and the contract was made in New York. If the appellant paid for the property bought in cash, there would have been no more assets in Virginia for the convenience of Virginia creditors than there were under the actual conditions of the sale, since the Southern Express Company, having withdrawn its business from Virginia would hardly be expected to send the cash realized to that state for deposit, to its own inconvenience.

The Virginia Court, therefor, did not have before it in the record, nor were there in existence, the facts necessary to support its decision, and it is the duty of this Court to review and correct the error.

Postal Tel. Cable Co. v. *Newport*, 247 U. S. 473;
So. Pacific v. *Schuyler*, 227 U. S. 611;
N. C. Ry. Co. v. *Zachary*, 232 U. S. 248;
Carlson v. *Curtis*, 234 U. S. 103;
Norfolk & W. R. Co. v. *Conley*, 236 U. S. 605;
Interstate A. Co. v. *Albert*, 239 U. S. 560.

POINT II.

The Special Court of Appeals of Virginia attempts to establish by judicial decision a rule of law which would be unconstitutional if created by statute; but, even if the State Legislature could properly enact such a statute, the decision of the State Court is not based upon principles of common law but is an attempt at judicial legislation under the police power of the State which cannot be applied retroactively to affect vested rights.

It is difficult to determine from the decision of the Special Court of Appeals of Virginia the exact ground upon which its decision is based. The authorities quoted by the Court for its decision deal with consolidated corporations only; while in the instant case the record is clear and positive that there was no consolidation, nor any expressed or implied agreement to assume the debts and liabilities of the selling corporation. It would seem that the Court of Appeals of Virginia assumes that in every case where property is purchased and paid for in stock of the purchasing corporation this *ipso facto* effects a consolidation or merger to such an extent as to make the purchasing corporation liable for the debts of the selling corporation, even though the selling corporation makes no distribution of the stock received for the property and has ample assets independent of such stock to meet the claims of its creditors.

One thing clearly appears from the decision of the Court and its citations of authorities which may be summed up in brief as follows: that the property located

in Virginia of a solvent foreign corporation constitutes a trust fund for the benefit of Virginia creditors.

There is neither constitutional nor statutory provision in Virginia imposing upon a person or corporation buying all or a part of the property of a foreign corporation doing business in Virginia liability for the debts of the selling corporation, even though the purchase price may be paid in stock of the purchasing corporation. The Legislature of the State of Virginia in the exercise of the police power of the State might enact a statute for the protection of its own citizens as creditors of a foreign corporation coming into the State to do business, provided such enactments were reasonably necessary for the object to be attained and did not invade rights under the Federal Constitution. It seems clear, however, under the decision of this Court in *Blake* v. *McClung*, 172 U. S. 239, that the State of Virginia could not without violating rights safe-guarded under the Constitution of the United States, even by statute, subject the assets of a foreign corporation doing business within the state to the claims of creditors within the state in preference to the right in equity of citizens residing in other states to participate upon terms equivalent with the citizens of Virginia in the distribution of assets of an insolvent corporation; and, from the decision in that case, it would seem even more doubtful that the Legislature of Virginia could impose the harsh and unreasonable rule that the property of any foreign corporation coming into Virginia to do business must be impressed with a trust in favor of Virginia creditors, although the corporation itself was solvent and, being engaged in interstate commerce, could

not be excluded from doing business within the State. As said by the Court in *Blake* v. *McClung, supra*:

> "We hold such discrimination against citizens of other states to be repugnant to the second section of the fourth article of the Constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for the purpose of business. Such a power cannot be exercised with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land."

The appellant in the instant case, a corporation engaged in interstate commerce, cannot be excluded from the State of Virginia by any statute of the Legislature, nor can the State require from it in advance any agreement expressed or implied as a condition of doing business. *Crutcher* v. *Kentucky*, 141 U. S. 474.

It seems doubtful, therefore, if the State of Virginia could, without a regulation of interstate commerce obnoxious to the Federal Constitution impose upon the appellant any burdens with respect to the use of its property within the State of Virginia, even by statutes passed for future operations.

Any doubt in the matter, however, disappears when we come to the question of the power of the Legislature to pass a statute affecting vested rights and acting upon transfers of property acquired prior to such legislation.

There can be no question that a statute creating a lien or obligation upon property already acquired before the enactment of the statute to pay the debts or lia-

bilities of the vendor in a sale consummated four years previous would be invalid, not only as impairing the obligation of a contract, but also as a deprivation of property without due process of law.

The Special Court of Appeals of Virginia, however, in the instant case undertakes to do by judicial decision what would be clearly unconstitutional if enacted as a statute by the Legislature of Virginia. The transaction entered into, by which the property was purchased by the appellant, was completed on July 1, 1918, and there was not prior to that date any decision by the state courts of Virginia imposing on the appellant a liability which did not attach by common law. So far as the decisions of the State of Virginia and the ruling decisions of other states and of this Court are concerned, the appellant took the property of the Southern Express Company free and clear of any lien of creditors and paid for the same upon the basis of its securities issued under the approval of an officer of the United States Government. There was no fraud, actual or constructive, and no suspicion of fraud attending the transaction which, by reason of its importance, received the widest publicity. Long after the appellant had closed up all of its transactions with the Southern Express Company and paid over to it all amounts due the Southern which came into its hands through the closing up of unfinished contracts, arises this claim on behalf of plaintiff who for two years held his judgment against the Southern Express Company without taking out an execution on the same or apparently endeavoring to collect it in any state in which the Southern Express Company had property.

The highest court of Virginia upon the record already pointed out, holds the appellant liable for the debts and liabilities of the Southern Express Company in Virginia; and, in so doing, enacts a new rule of law which would be unconstitutional if applied by statute. As said by this Court in *Blake* v. *McClung, supra*:

> "It is an established rule of equity that when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors (*Graham* v. *Railroad Co.*, 102 U. S. 148, 161)—*not simply of stockholders and creditors residing in a particular state, but all stockholders and creditors of whatever state they may be citizens.* (Italics ours.) In *Wabash, St. Louis, etc. Railway Co.* v. *Ham*, 114 U. S. 587, 594, it was said that the property of a corporation was a trust fund for the payment of its debts, in the sense that when the corporation was lawfully dissolved and all its business wound up, or when it was insolvent, all its creditors were entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. In *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 385, it was observed that a private corporation, when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exists in favor of the creditors of a partnership after becoming insolvent, and that in such a case a lien and trust will be enforced by a court of equity in favor of creditors. These principles obtain, no doubt, in Tennessee, and will be applied by its courts in

> all appropriate cases between citizens of that State, without making any distinction *between them*. Yet the courts of that State are forbidden, by the statute in question, to recognize the right in equity of citizens residing in other States to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent corporation lawfully doing business in that State."

If the rule announced by the Virginia Court of Appeals would have been unconstitutional as a statute, it seems clear that this Court can review it if its effect is to deny appellant the equal protection of the law and deprive it of property without due process of law.

Prudential Insurance Co. v. Cheek, 259 U. S. 529:

> "It seems to us clear that the state might, without conflict with the 14th Amendment, enact through its legislative department a statute precisely to the same effect as the rule of law and public policy declared by its court of last resort. And, for the purposes of our jurisdiction, it makes no difference, under that Amendment, through what department the state has acted. The decision is as valid as a statute would be."

The amendment of February 17, 1922, to Section 237 of the Judicial Code, clearly indicates that a change in a rule of law established in a state by judicial decision may violate rights under the Federal Constitution:

> "In any suit involving validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest

> court of a state would be repugnant to the Constitution of the United States, the Supreme Court shall upon writ of error remand, reverse or affirm the judgment of the State Court if such claim is set up in the case before the final judgment is entered by the State Court and the decision is against the claim so made."

This amendment clearly recognizes that rights may be vested under a rule of law laid down by the highest court of the state and that a change in such rule of law made by the highest court of the state may be repugnant to the Federal Constitution as impairing these vested rights. While this case does not come before this Court upon a writ of error, the question of the validity of a contract, *i. e.*, the contract of purchase by the appellant and sale by the Southern Express Company of its property is involved and is subject to review by this Court upon a writ of certiorari.

The decision of the State Court below, not being based upon any statutes or constitutional provision of the State of Virginia presumably depends for support upon the principles of the common law. There is, however, in the present case no peculiar reason for this Court to defer to the decision of the Virginia Court as to common law. It is the duty of Federal Courts to determine for themselves questions of commercial law, general jurisprudence and of rights under the Constitution of the United States.

Oates v. *First National Bank*, 100 U. S. 246;
Swift v. *Tyson*, 16 Peters. 1;
Guernsey v. *Imperial Bank*, 188 Fed. 300;
First National Bank v. *Liewer*, 187 Fed. 16.

Even if the decision of the Virginia Court were to be held to have created a fixed rule of property in the State of Virginia, the decision was made after the rights of the parties had accrued and was not controlling on the Federal Courts. It is their duty to exercise their independent judgment as to what the common law is.

> *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532;
>
> *Shaw* v. *C. C. C. & St. L. R. Co.*, 173 Fed. 750;
>
> *Brewer-Elliott Oil & Gas Co.* v. *U. S.*, 270 Fed. 104.

To make the decisions of the State Court obligatory on the Federal Court, the right must have accrued after the rule had been established.

> *Murray* v. *Wilson Distilling Co.*, 213 U. S. 157;
>
> *Great Southern Fireproof Hotel Co.* v. *Jones*, *supra*.

The rule previously established in Virginia as in other states where a corporation transferred all of its property to another corporation in exchange for stock of the new corporation and, after such transfer, the new corporation was controlled by the persons who had controlled the old corporation or the stock received or distributed among the stockholders of the old corporation, was that the new corporation was liable for the debts of the old, at least to the extent of the property acquired. However, the rule established in the present case extends the imposition of liability to an extent never

dreamed of previously. In this case, the vendor was a solvent corporation, the property transferred in Virginia was a very small part of the entire property and the selling corporation retained more than $1,000,000 in solid assets, amply sufficient to pay all of its debts and liabilities. There was no identity of control between the two corporations and the total stock received in Virginia and elsewhere by the selling corporation was approximately only about 5% of the stock of the purchasing corporation. There was no dissolution of the corporation and no distribution of stock to its stockholders of any kind. The old rule was applied because of identity of control, or the fact of dissolution of the old corporation or the distribution of the proceeds. The new rule holds that it is immaterial whether or not there is identity of control or the vendor remains in business or whether or not the proceeds of the sale are distributed among shareholders of the vendor. The only material thing, in view of the new rule, is that it is stock of the new corporation which is issued in exchange for the property transferred. The general rule of the common law is that a corporation which purchased all the property of another corporation is not *ipso facto* liable for the debts of the latter.

Postal Telegraph Co. v. *Newport*, 247 U. S. 464;

Gray v. *National Steamship Co.*, 115 U. S. 116;

Fogg v. *Blair*, 133 U. S. 534;

Koch v. *Speedwell*, 140 Pac. 598 (Cal.);

Buckler v. *U. S., etc. Co.*, 112 Atlantic 632 (Pa.);

Hageman v. *Southern Ry. Co.*, 202 Mo. 249;
McAlister v. *American Ry. Ex. Co.*, 103 S. E. 129 (N. C.);
Swing v. *Empire Lumber Co.*, 105 Minn. 356;
Cook on Corporations, 8th Edition, Vol. 3, Sec. 673, and cases cited.

The decision of the Virginia Court was not necessary to preserve the rights of creditors of the Southern Express Company who had exhausted every other remedy in an effort to collect, *but was imposed merely for the convenience of Virginia creditors.* The only right which was lost to the Virginia creditors by the transfer was that of having their claims adjudicated by Virginia courts, but the presumption of course attaches that a Virginia court would deal as fairly and impartially with a controversy arising between its own citizens and a foreign corporation as the Courts of another state. Hence the right so lost could not, without discourtesy to the Virginia Courts, be termed an advantage, but merely a convenience.

So far as the absolute rights of creditors are concerned in the instant case, they would not be impaired to any greater extent had the appellant bought the property of the Southern Express Company for cash and paid over the amount where the transaction of sale of all the property was completed, *i. e.*, at New York. They might have regarded it as inconvenient to bring their suits in New York where the property of the Southern Express Company was located, but if the convenience of litigants is to be made the determining factor, then it might be argued with equal force that if a corporation sold its property in a single county or municipality in

any state, the purchaser would take the property subject to an implied obligation to meet the debts and liabilities of the selling corporation arising within that particular county or municipality. In the instant case, however, the Court has not even the justification of convenience. No creditor in Virginia or elsewhere of the Southern Express Company was prejudiced by the transfer of the property to the appellant, and the Southern Express Company was in a better position to respond to the demand of its creditors than it was before the sale. The contract between the appellant and the Southern Express Company for the purchase of its property was valid under the common law of Virginia and elsewhere at the time it was made and nothing in the conduct of the appellant has in any way contributed to change it. The appellant became the owner of the property free and clear of all liens in July, 1918. The effect of the rule created by the Virginia Court is to make a new contract between the American Railway Express Company and the Southern Express Company under which the appellant is required to pay in addition to the consideration of the original contract the indefinite and indefinable sum of any claim of Virginia creditors which may be brought against it. As already pointed out an enactment by statute of the Virginia Legislature to the effect of this decision would be clearly unconstitutional, and it is impossible for us to see any distinction between judicial legislation by the Court under the police power and the enactment by the State Legislature under the same power. The law of the land established the ownership of the property in the appellant. The rule established by the Virginia Court takes it away four years after

the property was acquired. If this be not lack of due process of law and deprivation of the equal protection of the law, it is difficult to imagine a situation to which these terms would be applicable.

POINT III.

The judgment of the Circuit Court of the City of Norfolk against the Southern Express Company on which the judgment in this case is based is null and void because the Court did not have jurisdiction of the Southern Express Company and hence to require the appellant to satisfy a judgment based upon such claim would be to deprive it of its property without due process of law.

The appellant is held by the Virginia courts for an alleged liability of the Southern Express Company upon the theory that a purchase of a part of the property of the Southern Express Company rendered appellant liable for its debts and liabilities in Virginia.

The basis of the action against the appellant is a judgment entered by default in May, 1920, against the Southern Express Company, a foreign corporation, which admittedly withdrew from the State of Virginia on July 1, 1918, and has never been in business in the state since that time. The suit on which this judgment was entered was brought in September, 1919, and by order of the Court summons was served on the Chairman of the Corporation Commission of Virginia. The record shows that the Southern Express Company had no agent authorized to accept service within the state and that it appeared specially and moved to quash upon the

ground that it was not doing business within the state and that no proper service had been made upon it. The appellant was not a party to this action and it will be seen that the suit was brought more than a year and judgment rendered more than two years *after the purchase by the appellant of part of the Southern Express Company's property.* The judgment in question remained dormant for more than two years, no execution being taken out on same, and in July, 1922, this action was brought against the appellant, the declaration reciting the judgment recovered against the Southern Express Company, the purchase of all of the property of the Southern Express Company in Virginia by the appellant and *the distribution of the assets of the Southern Express Company among its stockholders to the exclusion and prejudice of its creditors.*

(a) *The judgment against the Southern Express Company is null and void.*

As already pointed out, the Southern Express Company, a foreign transportation corporation, doing business within Virginia up to June 30, 1918, withdrew from the state and left in it no authorized agent for the service of process. An attempt, therefore, of the Virginia courts to give effect to process served upon one of the state officials conferred no jurisdiction upon the court to enter a judgment *in personam* against the Southern Express Company. As said by this Court in *Philadelphia & Reading Co.* v. *McKibbin*, 243 U. S. 264:

> "A foreign corporation is amenable to process to enforce a personal liability in the absence of consent only if it is doing business within the

> state in such a manner and to such an extent as to warrant the inference that it is present there, and even if it is doing business within the state, the process will be valid only if served upon some authorized agent. *St Louis S. W. Ry.* v. *Alexander*, 227 U. S. 226. Whether the corporation was doing business within the state and whether the person served was an authorized agent are questions vital to the jurisdiction of this court. A decision of the lower court if duly challenged is subject to review in this court, and the review extends through findings of fact as well as conclusions of law."

The evidence in the case is without conflict. It is conceded by stipulation that the Southern Express Company was not doing business in the state after July 1, 1918. The return of the sheriff in the suit shows that no authorized agent of the company was served. Under the decisions of this Court, therefore, the judgment of the Circuit Court of the City of Norfolk was null and void, because the Southern Express Company did not have its day in court.

The Special Court of Appeals of Virginia apparently holds that the judgment against the Southern Express Company was merely voidable and not absolutely void, saying:

> "The Circuit Court of the City of Norfolk, a court of general jurisdiction, having jurisdiction of the subject matter and the parties upon the service of process adjudged by it to be valid and not void upon its face, is conclusive in Virginia upon other courts and not open to collateral attack. * * * The Southern Express Com-

> pany has not been denied due process of law and the judgment against it was properly admitted in evidence."

The Virginia courts appear to have been misled by failing to observe the distinction between void judgments and those which are merely voidable, and in this error not only are out of harmony with the uniform decisions of this Court and other states, but also with the decisions of their own courts. In *Gray* v. *Stevart*, 74 Virginia 351, the Court said:

> "The leading distinction is between judgments and decrees merely void and such as are voidable only. The former are binding nowhere; the latter everywhere until reversed by a superior authority." (Citing *Harris* v. *Hartman*, 14 How. 334.)

As said by this Court in an opinion by Mr. Justice White in *Haddock* v. *Haddock*, 201 U. S. 562:

> "Where a personal judgment has been rendered in the courts of a state against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. *Indeed a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the state where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the state where rendered, the enforcement of such a judgment.*" (Italics ours.)

Again, as said in *McDonald* v. *Maybee*, 243 U. S. 90:

> "An ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the state as outside of it."

The finding of the Circuit Court of the City of Norfolk that it had jurisdiction of the case could not confer jurisdiction on the Court unless it affirmatively appeared in the record that the defendant Southern Express Company, a foreign corporation, was doing business within the State. *Knapp* v. *Wallace*, 50 Oregon 348.

The record in the instant case abundantly shows that the Southern Express Company was not within the jurisdiction of the Court. The declaration, while reciting that the Southern Express Company is a foreign corporation authorized to do business in Virginia, does not recite that the Southern Express Company was doing business in Virginia at the time the action was brought. The return of the sheriff recited that the lawfully appointed agent of the company for the service of legal process was no longer a resident of Virginia and was absent from the state and that no person residing in the state had been appointed in his place and that the summons was executed by delivering a copy to the Chairman of the State Corporation Commission.

The record of a special appearance and motion to quash on behalf of the Southern Express Company recites that at the time of and before the service of process it had no agent in the state on whom the said notice could be lawfully served and at the time of the aforesaid attempted service it was not carrying on its business in

Virginia and did not accept or waive service of said writ.

In the instant case, counsel for the plaintiff stipulated that after July 1, 1918, the Southern Express Company no longer operated a transportation company in Virginia. It clearly appears, therefore, that the Circuit Court of the City of Norfolk, in adjudging that it had jurisdiction of the Southern Express Company in an action *in personam* relied solely upon the jurisdiction obtained by service on the Chairman of the Corporation Commission, presumably under the Virginia statute affecting transportation corporations who have failed to designate an agent for service of process. But the statute in question must be construed as affecting only such corporations as are still doing business within the state since to give it a construction that would enable service to be made upon corporations not doing business within the state would be to extend the laws of Virginia beyond its borders. As said by this Court in *St. Clair v. Cox*, 106 U. S. 350, construing a similar state law:

> "We do not understand the law as authorizing the service of a copy of the writ as a summons upon an agent of a foreign corporation, unless the corporation be engaged in business in the state and the agent appointed to act there. We so construe the words 'agent of such corporation within the state.'"

Again, at page 359 in the same case, the Court says:

> "It is sufficient to observe that we are of the opinion that when service is made within the

> state upon an agent of a foreign corporation, it is essential in order for the jurisdiction of the court to render a personal judgment it should appear somewhere in the record, either in the application for the writ or accompanying its service or in the pleadings or the findings of the court that the corporation was engaged in business in the state."

It seems clear, therefore, that under the decisions of this Court, the statute of Virginia prescribing substituted service upon the Chairman of the Corporation Commission must be held to apply only to those foreign corporations which are doing business within the state at the time of the attempted service; and that any construction by the courts of Virginia that the statute contemplated service upon the Chairman of the Corporation Commission in the case of a foreign corporation not doing business within the state would make the statute itself obnoxious to the Federal Constitution as lacking in due process of law. Therefore, the judgment of the Circuit Court of the City of Norfolk against the Southern Express Company is void because it clearly appears the Court did not have jurisdiction to enter a judgment *in personam* against that company.

(b) *For the Virginia courts to require the appellant to satisfy a judgment based upon a nullity would be to deprive the petitioner of its property without due process of law.*

Even if appellant had specifically assumed the debts and liabilities of the Southern Express Company a judgment against appellant upon a liability of the

Southern Express Company could only be rendered after a hearing following due process of law and proof of fact establishing such liability. If appellant were in fact or in law liable for the liabilities of the Southern Express Company, the law of the land requires that such liabilities be established by proof of facts in an action in which appellant is a party or in which it might plead and prove any defenses which could be pleaded or proved by the Southern Express Company. Under such conditions the appellant might become liable for a judgment against the Southern Express Company secured *prior* to the purchase of the property and of which the appellant therefore would be deemed to have had notice when it purchased the property as a possible lien against the same, or if the appellant had been made a party to the action against the Southern Express Company, and thus have had notice of the liability claimed against it, and the opportunity to defend in the action upon which the void judgment was rendered. The appellant was in Virginia doing business throughout the state and easily accessible for service upon it in such suit while the Southern Express Company was beyond the jurisdiction of the Virginia courts. Notwithstanding these facts more than four years elapsed before the appellant in the suit in the instant case was served with any notice that the creditors of the Southern Express Company asserted a lien on the property purchased from that company by the appellant. Indulging the respondent to the greatest extent possible, therefore, it would seem that neither in law nor in equity could it assert successfully a claim against appellant under such a state of facts.

The judgment of the Circuit Court of the City of

Norfolk against the Southern Express Company being a nullity it necessarily follows that a judgment against the appellant based upon a void judgment must also be a nullity and a denial of due process of law. The appellant under the law of the land is entitled to notice and a full hearing and to have judgment rendered against it only upon the proof of facts which rendered it liable. The admission, therefore, by the Circuit Court of the City of Norfolk of the record and judgment in a prior adjudication to which the appellant was not a party and of which it can neither be charged with constructive notice or actual notice was a denial of due process of law within the meaning of the federal constitution.

But the record in the instant case shows clearly that the appellant was not liable for the debts of the Southern Express Company and that the conditions attending the purchase by it of the property of the Southern Express Company did not impress that property with a lien or trust in favor of creditors. The Southern Express Company was not insolvent. Upon the contrary, it had ample property for the satisfaction of every legal liability against it. As said in *McDonald* v. *Williams*, 174 U. S. 397:

> "When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation."

The appellant was a *bona fide* purchaser for value under circumstances which exclude any suggestion of fraud either actual or constructive, and was entitled to purchase the property it obtained from the Southern Express Company without regard to the latter's creditors. As said in *Hollins* v. *Briarfield Coal & Iron Co.*, 150 U. S. 371:

> "A party may deal with a corporation in respect to its property in the same manner as with an individual owner and with no greater danger of being held to have received into his possession property burdened with a trust or lien."

The judgment against the Southern Express Company being *in personam* and the Court having no jurisdiction of the defendant, the entire proceeding was a nullity, and therefore to take the property of the appellant to satisfy a void judgment against the Southern Express Company is lacking in due process of law under the Federal Constitution.

POINT IV.

The judgment of the Special Court of Appeals of Virginia should be reversed and bill of the plaintiff-respondent should be dismissed.

CHARLES W. STOCKTON,
Attorney for Defendant-Appellant.

BRANCH P. KERFOOT,
Of Counsel.

APPENDIX.

Opinion.

SPECIAL COURT OF APPEALS.
CIRCUIT COURT OF CITY OF NORFOLK.

AMERICAN RAILWAY EXPRESS COMPANY, A CORPORATION.

—v—

F. S. ROYSTER GUANO COMPANY, A CORPORATION.

Richmond, Va., February 26, 1925.

Opinion states the facts.

CHRISTIAN, *J.*:

In 1917, the Southern Express Company, that was then doing business in Virginia and other Southern States, had delivered to it, at Richmond, Virginia, on the 27th day of September, 1917, two packages of tax tags, valued at $450, consigned to the F. S. Royster Guano Company, at Norfolk, Virginia. These packages were lost in transit, and the consignee filed claim with the Express Company before July 1, 1918, for its damage by reason of the loss. Prior to this latter date, the Director General of Railroads required all the express companies doing business over the railroads in the United States to merge and consolidate into one express company. This was accomplished by the independent

express companies securing a charter from the State of Delaware, under the name of The American Railway Express Company, to which they conveyed and transferred all of their tangible assets used in the express business, though each of the companies retained their corporate existence, officers and offices. In payment for the assets turned over to the American Railway Express Company according to the value thereof, it issued to each constituent company so much of its capital stock at par as represented its input. The Southern Express Company received in this distribution of stock $1,750,000, which it still holds and owns, with other available assets of approximately $1,000,000. While doing business in Virginia, the Southern Express Company, appointed John D. Hockaday its agent, upon whom process against it might be served. Immediately after the consolidation took place, Hockaday removed from the State and there was no statutory agent left in the State upon whom process could be served.

The F. S. Royster Guano Company brought in the Circuit Court of the City of Norfolk its action of trespass on the case for $600 damages, for the loss above mentioned, against the Southern Express Company, and matured the same on process returnable on the 1st December rules, 1919, which process was served on W. F. Rhea, Chairman of the Corporation Commission, and by immediately transmitting a copy thereof by mail to said company, pursuant to Subsection 3 of Section 1294 of the Code of Virginia, 1904.

The Southern Express Company appeared specially in the case and moved the Court to quash the writ and return because it had ceased to do business in the State

at the time of the issuance of the writ, nor did it have any statutory attorneys therein, the former one having removed therefrom for more than a year. The Court, upon consideration, overruled the motion to quash, and the defendant made no further appearance nor appealed therefrom.

The Circuit Court of the City of Norfolk, at its May, 1920, term, proceeded to hear and determine the case without the intervention of a jury, and the plaintiff being fully heard, the Court entered judgment against the Southern Express Company for the plaintiff for the sum of four hundred and fifty dollars, with interest from the 15th day of May, 1920, till paid. No execution was issued upon this judgment.

At the first July rules, 1922, in the Circuit Court of the City of Norfolk, the plaintiff filed a declaration in debt against the American Railway Express Company upon its judgment against the Southern Express Company, alleging liability upon the defendant by reason of the fact that it had taken over the assets of the Southern Express Company, and that such assets had been distributed to the exclusion and prejudice of its creditors.

The case coming on to be heard by the Court without the intervention of a jury, on the 13th day of April, 1923, judgment was entered for the plaintiff against the defendant for four hundred and sixty-one dollars and forty cents ($461.40), with legal interest on $450 from the 15th day of May, 1920, till paid and its costs. Motion to set aside the judgment was made and overruled, to which the defendant excepted. The case is before this Court on exceptions, for error in overruling the defendant's motion for a new trial, and errors committed in

the course of the trial. For convenience the parties will be spoken of as plaintiff and defendant, as they were in the trial Court.

The first error for consideration is the action of the Court in striking out the defendant's plea of the Statute of Limitations. No execution was issued upon the judgment against the Southern Express Company and Section 6477 Code of Virginia provides:

> "On a judgment, execution may be issued within a year and a *scire facias* or *action* may be brought within ten years after the date of the judgment * * *."

The contention of the defendant was that "a *scire facias*" or *action* was the same or identical proceedings in law. This was not the correct construction of the Statute. The proceeding by *scire facias* in this State is not a new suit, but a continuation of the old suit. Its object is to obtain execution of a judgment which has become dormant by the lapse of time, and it is essential that the writ, which serves the double purpose of a writ and a declaration, shall state all the facts necessary to authorize the relief sought. It should follow the judgment to be revived as to the amount, date and parties. *White* v. *Palmer*, 110 Va. 490.

> "At the common law, an action of debt will lie on a judgment as soon as it is recovered, and *without regard to the plaintiff's right to take out execution;* for the remedy by execution is cumulative merely, and the statutes giving this remedy do not impair the common law right of action on the judgment as a debt of record." Black, Judg-

ments, Sec. 958. *Hickman* v. *Macon Co.*, 42 Fed. 759; *Wilson* v. *Hatfield*, 121 Mass. 551; *Stewart* v. *Peterson*, 63 Pa. St. 230; *Kingsland* v. *Forest*, 18 Ala. 519, 52 Am. Dec. 232.

The Statute of Virginia recognizes the action of debt as at common law, and fixes the limitation at ten years. The plea of the Statute of Limitations was properly stricken out.

The next error alleged is that the Circuit Court of the city of Norfolk was without jurisdiction of the Southern Express Company, and that the judgment of the plaintiff was void. This matter was submitted to the Court, in that action, upon a motion to quash the return because the service was illegal, and was decided adversely to the company; and having appeared specially, no further appearance was made in the case nor effort to have same reviewed. It is well settled "that defects or irregularities in the process or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely nugatory, in which case the judgment fails for want of jurisdiction. It follows that a judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice although such service of notice may be materially defective." Black, Judgments, Sec. 263. *Murray* v. *Weigle*, 118 Pa. St. 159, 11 Am. Rep. 781; *Allison* v. *Rankin*, 7 Serg. & R. 269.

It need scarcely be added that if the judgment sued on be a foreign judgment, or one rendered in a sister

State, the question of jurisdiction is always open to inquiry. Black, Judgments, Secs. 818, 835, 894-915. The cases cited and discussed before the Court are of this latter character and are therefore not authority upon the question of jurisdiction before this Court.

The Circuit Court of the city of Norfolk, a court of general jurisdiction, having jurisdiction of the subject matter and parties, upon the service of process adjudged by it to be valid and not void upon its face, is conclusive in Virginia upon other courts, and not open to collateral attack. This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. "It is one which has been adopted in the interest of the peace of society and the permanent security of title. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation and no fixed established rights." *Lancaster* v. *Wilson*, 27 Gratt. 624, 629. *Voorhees* v. *The Bank of the United States*, 10 Peters (U. S.), 449, 474; *Wilcher* v. *Robertson*, 78 Va. 602.

The Southern Express Company had not been denied "due process" of law, and the judgment against it was properly admitted in evidence.

The other assignments of error are based upon the claim of the defendant that the evidence does not prove that the Southern Express Company was merged and consolidated into the American Railway Express Company, and that the Southern Express Company still

maintains its corporate existence, and that such merger was by compulsion of the Director General of Railroads.

It is uncontroverted that the Southern Express Company turned over its business and property used in its business, along with another express company, for its proportionate share of the stock of the defendant, and ceased to do an express business, nor were any assets left in the State of Virginia to pay the obligations of the Southern Express Company.

The case of *American Railway Express Company* v. *Downing*, 132 Va. 139, in an able and exhaustive opinion by Judge Sims, settled the law in Virginia in reference to the merger of the Southern Express Company and others in to the defendant company as a consolidated corporation, liable for the debts of the constitutent companies. The following is the law on the subject as therein stated: "When two or more corporations are consolidated into a new corporation with a new name, and the constituent corporations go out of existence, if no arrangements are made respecting their property and liabilities, the consolidated corporation will be answerable for their liabilities, at least to the extent of the property acquired from the constituent corporation whose liability is sought to be enforced against the consolidated corporation." As to the constituent corporation *going out of existence*, it is held: "It is not essential to the liability of the corporation for the debts or claims against its constituent corporations that the constituent companies cease to exist *de jure* upon the organization of the new corporation. The going out of existence of the constituent companies is the cessation of all actual transactions of business as a going concern. Its con-

tinued existence *de jure* for the purpose of winding up its affairs is immaterial." *Am. Ry. Ex. Co.* v. *Downing, supra.*

The principles upon which the cases are based, are that the assets of the constituent corporations are a trust fund for payment of their debts, and when the consolidated corporation takes over the assets in exchange for stocks and bonds, there is an implied contract in law to pay such debts out of the assets.

The judgment of the Circuit Court is plainly right, and will be affirmed.

Affirmed.

A copy, Teste:

(Name illegible)
C. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

NO. ~~477~~ 116

AMERICAN RAILWAY EXPRESS COMPANY,
Plaintiff in Error.

vs.

F. S. ROYSTER GUANO COMPANY,
Defendant in Error.

IN ERROR TO THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

CADWALLADER J. COLLINS,
Attorney for Defendant in Error,
Law Building, Norfolk, Va.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

NO. 477

AMERICAN RAILWAY EXPRESS COMPANY,
Plaintiff in Error.

vs.

F. S. ROYSTER GUANO COMPANY,
Defendant in Error.

IN ERROR TO THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

On the 4th day of May, 1925, notice was served on counsel for respondent that on the 18th day of May, 1925, application would be made for a writ of certiorari in this case. The application was actually made on May 25th, 1925, without notice to counsel for respondent of the change of date. It is respectfully submitted that the court's requirements on application for writs of certiorari have not been complied with.

STATEMENT OF THE CASE.

The defendant in error is unable to acquiesce in the argumentative statement of this case as set forth in the transcript of the record and petition for a writ of certiorari and therefore submits the following statement of the case:

On the 27th day of September, 1917, there was delivered to the Southern Express Company at Richmond, Virginia, two packages of fertilizer tax tags for shipment to the F. S. Royster Guano Company at Norfolk, Virginia, which were lost in transit. The F. S. Royster Guano Company filed its claim with the Southern Express Company in due time, and after much correspondence, that brought forth no results, it commenced an action at law, in September, 1919, in the Circuit Court for the City of Norfolk, Virginia, against the Southern Express Company for the recovery of the value of the tax tags. During the time its claim was in the hands of the Southern Express Company, that is to say, on the 1st day of July, 1918, the Southern Express Company transferred its business and all of its tangible property in Virginia, and elsewhere, to the American Railway Express Company (plaintiff in error), and received in exchange therefor 10,000 shares of stock of said American Railway Express Company, of the value of one hundred ($100) dollars each (R. pp. 18-21). It was known to the public in general that the American Railway Express Company had taken over the Southern Express Company, and other express companies, but this was supposed to be for the period of the war only, and defendant knew nothing

about the details of this transfer until long after it had entered suit against the Southern Express Company; in fact, its first knowledge of the details of the transfer was obtained from the case of *American Railway Express Company* v. *J. W. Downing*, 132 Va., 139.

The Southern Express Company is, or was in 1919, incorporated under the laws of the State of Georgia and when process was issued in this case, it was ascertained that John B. Hockaday, the appointed agent upon whom process against the Southern Express Company had before that time been served, had been removed from the State of Virginia, and that no person residing in Virginia had been appointed in his place, and therefore process was, on the 16th day of September, 1919, served on Hon. William F. Rhea, chairman of the State Corporation Commission, under the authority of clause 3, section 1294-G, Pollard's Code, 1904. A transcript of sub-sections 2 and 3 of section 1294-G of the Code of 1904 of Virginia, is set forth at pages 7 and 8, and of service of process upon the Southern Express Company at pages 27-28 of the record.

On the 18th day of November, 1919, the Southern Express Company appeared specially and moved the court to quash the service and writ on the ground that at the time of the service it had no agent in Virginia on whom process could lawfully be served, but the court overruled the motion and no exception to this ruling having been taken, the case came on to be tried in May, 1920, when plaintiff recovered judgment for its claim with interest. A copy of the special plea setting up the motion to quash the service and writ in the

action of the F. S. Royster Guano Company against the Southern Express Company is set forth at page 29 of the record.

In Virginia debt is the proper remedy when an action is brought on a judgment and having ascertained that the American Railway Express Company had acquired the assets of the Southern Express Company and issued stock therefor, the F. S. Royster Guano Company filed its action of debt against the American Railway Express Company, in April, 1923, and in due time recovered a judgment which was, on appeal, affirmed by the Special Court of Appeals of the State of Virginia. This case is reported in 126 S. E., 678, and a copy of the opinion of the court is appended to the appellant's petition for a writ of certiorari.

BRIEF OF ARGUMENT.

A STATE MAY VALIDLY PROVIDE FOR SERVICE OF PROCESS UPON A FOREIGN CORPORATION WHICH HAS CEASED TO DO BUSINESS WITHIN THE STATE IF THE CAUSE OF ACTION AROSE IN THE STATE BEFORE THE WITHDRAWAL.

On the 27th day of September, 1917, the F. S. Royster Guano Company delivered two packages of tax tags to the Southern Express Company at Richmond, Virginia, for shipment to Norfolk, Virginia, which were lost in transit, and in September, 1919, it commenced an action at law against the Southern Express Company for the recovery of the value of these tax tags. On or about the 1st day of July, 1918, the Southern Express Company, a Georgia corporation, transferred its business and property in Virginia to the American Railway Express Company and at the same time revoked the designation of John B. Hockaway as its agent in Virginia, upon whom process might be served, and having failed to appoint any person in his place, process in the action against the Southern Express Company was, on the 16th day of September, 1919, served on the chairman of the State Corporation Commission as provided by Section 1294-G, Pollard's Code 1904 (R. pp. 7-8). In May, 1920, the Circuit Court for the city of Norfolk, Virginia, rendered judgment against the Southern Express Company for the value of the aforesaid tax tags and upon this judgment the F. S. Royster Guano Company brought an action

of debt against the American Railway Express Company in which action judgment was rendered by the trial court against the American Railway Express Company and this judgment was sustained by the Special Court of Appeals of Virginia. The first ground of error assigned in the petition of the American Railway Express Company for a writ of certiorari seems to be that the judgment against the Southern Express Company was without personal service of process, or its equivalent, and that it was therefore a void judgment and could be so treated in this proceeding; in brief the appellant seems to claim that process served under clause 3, section 1294-G, Pollard's Code of Virginia, 1904, considered with reference to the Federal constitution and the decisions of the Supreme Court of the United States is not due process of law.

A state may exclude a foreign corporation altogether and it may therefore admit it on such conditions as the state may choose to impose.

> "If a foreign corporation voluntarily does business within the State, it is bound by a reasonable regulation of that business imposed by the State, not because it is found there, not because it has consented to those regulations, but because it is as reasonable and just to subject the corporation to those regulations as though it had consented. The jurisdiction is based upon the control of the State resulting from the voluntary act of the corporation in doing business within the State, not from its voluntary consent to be bound by the laws of the State."
>
> Fundamental of Procedure in Actions at Law—Austin Wakeman Scott, p. 56.

Conceding that the Southern Express Company was not present in the State of Virginia when process was served, nevertheless the state had a right to confer upon its courts jurisdiction over the company as to causes of action which arose in the state before the withdrawal, and it did this by providing that upon the removal, resignation or death of the person designated as the agent upon whom process against a foreign express company could be had, service of process might be upon the chairman of the State Corporation Commission with like effect as upon the agent appointed by the Company. Section 1294-G, Code of 1904 (R. pp. 7-8).

In the case of *Mutual Reserve Association* v. *Phelps*, 190 U. S. 147, a Kentucky statute provided that before commencing to do business, foreign corporations must file with the commissioner of insurance a resolution of the Board of Directors consenting to service of process upon any agent or upon the insurance commissioner. On May 10th, 1893, the Mutual Reserve Association filed the resolution required by law; on October 10th, 1899, the insurance commissioner cancelled the license and notified the Mutual Reserve Association that its authority to do business in Kentucky had been revoked and from that date said association had no agent in Kentucky and did no new business whatsoever in the state. On February 28, 1900, Phelps commenced an action in the Circuit Court of Jefferson County, Kentucky, against the Mutual Reserve Association, alleging that on July 16th, his application for membership had been approved and a certificate of insurance issued to him. A summons

was issued and served on the insurance commissioner and the defendant appeared specially and moved to quash the service. The motion was over-ruled and defendant taking no further action, judgment was rendered on May 19th, 1900, in favor of the plaintiff. After this judgment had been obtained, the association brought suit to enjoin its enforcement, alleging that the service of summons on the insurance commissioner was insufficient to bring it into the state court as a party defendant, and that the judgment rendered in the case was void. The case finally reached the Supreme Court of the United States, and that court, speaking by Mr. Justice Brewer, said:

> "The plaintiff was a citizen of Kentucky, and the cause of action arose out of transactions had between the plaintiff and defendant while the latter was carrying on business in the State of Kentucky under license from the State. Under these circumstances, the authority of the insurance commissioner to receive summons in behalf of the association was sufficient."

In *Hunter* v. *Mutual Reserve Life Insurance Company*, 218 U. S. 573, Hunter sued the Insurance Company in the State of New York upon five judgments obtained in the State of North Carolina. The judgments in North Carolina were obtained by default after service made upon the insurance commissioner of the State of North Carolina on five policies issued by the Mutual Reserve Life Insurance Company, a New York corporation, one of which said policies was issued to a citizen of North Carolina while the com-

pany was doing business in North Carolina and before it had removed from the state and four of which said policies had been issued to citizens of New York and New Jersey and assigned to a citizen of North Carolina for the purpose of having suit brought in North Carolina. The trial court in New York rendered judgment for the full amount of the five policies, but on appeal the Court of Appeals of the State of New York reversed the judgment as to the four policies issued to citizens of New York and New Jersey and affirmed the judgment as to the policy issued to a citizen of North Carolina while the company was doing business in North Carolina.

The Federal question raised was that due faith and credit had been refused the judgments obtained in North Carolina on the four policies issued in New York and New Jersey, and an appeal was taken to the Supreme Court of the United States which affirmed the judgment of the Court of Appeals of the State of New York.

We respectfully submit that in the case of F. S. Royster Guano Company against Southern Express Company, jurisdiction was acquired by the Circuit Court for the city of Norfolk, Virginia, by personal service of the summons within the state upon Hon. William F. Rhea, chairman of the State Corporation Commission under the authority of clause 3, section 1294-G, Pollard's Code, 1904, and that the State Court was right in overruling the motion to quash the service and writ in the action. (R. pp. 29-30).

IT IS GENERALLY HELD THAT WHEN A CORPORATION TAKES OVER ALL THE PROPERTY OF ANOTHER, PAYING THEREFOR IN CAPITAL STOCK, THE TRANSACTION IS A CONSOLIDATION AND THE CONSOLIDATED CORPORATION BECOMES LIABLE FOR THE DEBTS AND LIABILITIES OF THE CONSTITUENT CORPORATIONS.

In the instant case, defendant in error filed interrogatories in accordance with Section 6236 of the Code of Virginia, and in its answer to these interrogatories plaintiff in error makes the following statements (R. p. 18):

> "The American Railway Express Company purchased on June 30th, 1918, the tangible property used in the express business theretofore owned by the Southern Express Company and paid for the same with shares of its capital stock.
>
> The valuation placed on the property purchased from the Southern Express Company cannot be given as the Southern Express Company was owned by the Adams Express Company and the value of their tangible property was included in the value of the property purchased from the Adams-Southern Companies.
>
> All of the property purchased from the Adams Companies was paid for with capital stock of the American Railway Express Company.
>
> 10,000 shares of stock of the American Railway Express were issued in the name of the

> Southern Express Company at the request and direction of the Adams and Southern Express Companies." Record, p. 18.

It thus appears that the Southern Express Company, without paying its debts or providing for its liabilities, transferred its corporate assets in Virginia and elsewhere to the American Railway Express Company and accepted 10,000 shares of stock of the American Railway Express Company therefor. This was not a purchase of the assets and property of the Southern Express Company, it was simply an absorption of the Southern Express Company into the American Railway Express Company, and this action at law was instituted for the purpose of compelling the American Railway Express Company to satisfy the claim of a creditor of the Southern Express Company out of assets received from the Southern Express Company. The transaction is out of the ordinary course of business and the circumstances of the case imply knowledge on the part of the American Railway Express Company of all facts necessary to charge the property in its hands received from the Southern Express Company with the debts and liabilities of the Southern Express Company.

With deference it is submitted that the governing principle in this case is that the Southern Express Company could not transfer its assets for stock to the prejudice of its creditors without rendering the transferee personally liable for the debts of the Southern Express Company.

7 Ruling Case Law, p. 181, Section 155.

In the case of *Jennings Neff Co.* v. *Crystal Ice Co.* (Tenn.), 159 S. W. 1088, the Crystal Ice Company

transferred its plants and assets to the Atlantic Ice & Coal Company, and ceased its business of manufacturing ice. The only consideration received by the Crystal Ice Company for its assets was stock and bonds of the Atlantic Company. The suit of Jennings Neff & Company was pending against the Crystal Company when it was absorbed by the Atlantic Company and a judgment was recovered against the Crystal Company. In holding that the Atlantic Company was liable to Jennings Neff & Company for the amount of this judgment, the court said:

> "From the foregoing, it is seen that we have presented to us a case in which one corporation has acquired practically the entire assets of another in exchange for the stock and bonds of the purchasing company. The selling company retains no property and goes out of business. This is not, strictly speaking, a legal merger because the selling company retains its legal entity, although it is entirely dismantled of its assets. Such a transaction is sometimes referred to as a de facto merger. Whether the merger be de facto or de jure, the plight of the creditors of the absorbed corporation is the same. No property is left out of which they may satisfy their claims in either case in the hands of the selling corporation."

The case of *American Railway Express Company* v. *Downing*, 132 Va. 139, is similar to the instant case in every respect and in that case the American Railway Express Company was held answerable to Downing for a liability of the Adams Express Company which existed at the time of the absorption. See also

Sanford v. *Detroit &c. Ry.* (Mich.) 89 N. W. 960.
Howell v. *Lansing* (Mich.) 109 N. W. 846.
Atlantic &c. v. *Johnson* (Ga.) 56 S. E. 482.

As an answer to appellant's contention that the remedy of creditors of the Southern Express Company was not impaired by the sale of its property and withdrawal from the State of Virginia, it is submitted for the consideration of the court that the Southern Express Company left unsettled a great many, possibly hundreds of small claims, most of which were less than one hundred dollars, and unless the American Railway Express Company can be compelled to satisfy these claims, they are worthless, for the small creditors of the Southern Express Company cannot afford the cost of litigating them in foreign states. Furthermore if by the transfer of its property, the right was lost to Virginia creditors of the Southern Express Company to have their claims adjudicated by Virginia courts as contended by appellant, where can they sue? The Southern Express Company is a corporation under the laws of the State of Georgia, but after long and expensive litigation in that state it would probably transpire that the company had no property located in Georgia. Appellant seems to invite litigation in New York by admitting that the Southern Express Company has property there (brief p. 40) but if suit were brought in New York on a transitory cause of action which arose in Virginia the Southern Express Company would probably contend that the loss occurred while it was doing business in Virginia and that therefore suit should have been brought in that state.

Much is said in appellant's brief about its constitutional rights, but, with deference, we submit that corporations cannot escape liabilities incurred before the absorption of one by the other by the simple method of transferring property for stock, if the transfer hinders delays and defrauds creditors; and the corporation taking over the assets is not denied equal protection of the law or deprived of its property without due process of law because it is held liable for the debts of the transferer corporation.

Respectfully submitted,

F. S. ROYSTER GUANO COMPANY,

By

CADWALLADER J. COLLINS,

Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 116.—October Term, 1927.

American Railway Express Company, Petitioner, *vs.* F. S. Royster Guano Company.	On Writ of Certiorari to the Special Court of Appeals of the State of Virginia.

[February 21, 1927.]

Mr. Justice McReynolds delivered the opinion of the Court.

Following an agreement of June, 1918, by the Adams Express Company, American Express Company, Southern Express Company (a Georgia corporation) and Wells Fargo & Company, the principal concerns then engaged in express transportation throughout the Union, the American Railway Express Company was incorporated under the laws of Delaware and, by issuing its capital stock, acquired, July 1, 1918, all property of those carriers theretofore utilized in connection with such business. The Southern Express Company owned no other property located in Virginia. After this transfer it retired from the State; but in New York continued to hold valuable assets, including the stock of petitioner so received, and was solvent.

September 15, 1919, respondent sued the Southern Company in the Norfolk Circuit Court for the value of goods intrusted to it in 1917 for transportation from Richmond to Norfolk, Va., and lost. Summons was executed by delivering a copy to the Chairman of the State Corporation Commission and transmitting another to the defendant by mail. A special plea challenged the validity of the service upon the ground that the defendant had withdrawn from the State and was no longer a foreign corporation doing business there within the meaning of the Code provisions printed in the margin.* This special plea was overruled; defendant failed to plead further, and judgment went by default May 15, 1920.

*Section 1294g, subsec. 2-3, Virginia Code 1904—

(2) Every such corporation, company, association, person or partnership shall, by a written power of attorney, appoint some person residing in this

July, 1922, respondent here sued petitioner for the amount of the above-described judgment upon the theory that under the narrated circumstances the latter became liable for outstanding obligations of the Southern Company contracted in Virginia. After a full and fair hearing the trial court gave judgment therefor. The Special Court of Appeals affirmed this action. 141 Va. 602.

What we have said in *American Railway Express Co.* v. *Commonwealth of Kentucky*, decided this day, is enough to dispose of all material points raised here except the claim that the judgment against the Southern Express Company was void because not based on proper service of process; and that is without merit. Evidently the statute might reasonably be construed as intended to designate an agent upon whom process should be served in suits growing out of transactions within the State where the corporation had failed so to do. The state court gave the statute that effect, and we are bound by the result. *Mutual Reserve Association* v. *Phelps*, 190 U. S. 147, 158; *Hunter* v. *Mutual Reserve Life Insurance Co.*, 218 U. S. 573.

The judgment of the court below must be affirmed.

Mr. Justice SUTHERLAND and Mr. Justice BUTLER, dissent.

State its agent, upon whom may be served all lawful process against such corporation, company, association, person or partnership, and who shall be authorized to enter an appearance in its or his behalf. A copy of such power of authority, duly certified and authenticated, shall be filed with the State Corporation Commission, and copies thereof, duly certified by the clerk of the said commission, shall be received as evidence in all courts of this State.

(3) If any such agent shall be removed, resign, die, become insane, or otherwise incapable of acting, it shall be the duty of such corporation, company, association, person, or partnership, to appoint another agent in his place, as prescribed by the preceding section. And until such appointment is made, or during the absence of such agent of any such corporation, company, association, person or partnership, from the State, or if no such agent be appointed as prescribed by the preceding section, service of process may be upon the chairman of the State Corporation Commission, with like effect as upon the agent appointed by the company. The officer serving such process upon the chairman of the State Corporation Commission shall immediately transmit a copy thereof, by mail, to such corporation, company, association, person, or partnership, and state such fact in his return.